Supreme Court, U.S.
FILED

971737 APR 23 1998

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No. _____

In The

Supreme Court of the United States

October Term, 1997

CHARLES A. HOOVLER, LINDA L. OKOS, MARTIN OKOS, PATRICIA ANN PALMER, ROBERT M. STWALLEY, III, and JEFF SYMMES, INDIVIDUALLY AND AS REPRESENTATIVES FOR AND ON BEHALF OF ALL OTHER TAXPAYERS SIMILARLY SITUATED,

Petitioners,

vs.

STATE OF INDIANA and INDIANA DEPARTMENT OF REVENUE,

Respondents.

On Petition For Writ Of Certiorari To The Indiana Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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137 pp

QUESTIONS PRESENTED

1. Whether an act of the Indiana General Assembly which authorizes a tax increase for substance removal and remedial action only in counties having a population between 129,000 and 130,600 is contrary to the equal protection clause of the Fourteenth Amendment of the United States Constitution.

2. Whether a population classification in an act of the Indiana General Assembly providing for a special tax increase is, for equal protection purposes, rationally related to the State of Indiana's claimed purpose of providing funding for substance removal and remedial action at a landfill in Tippecanoe County.

3. Does the State of Indiana have a legitimate interest, for equal protection purposes, in avoiding the effects of the Comprehensive Environmental Response, Compensation, and Liability Act which justifies the use of an arbitrary population classification.

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1. *State of Indiana, et al. v. Charles Hoovler, et al.*, 668 N.E.2d 1229 (Ind. 1996); *reh'g denied*, 673 N.E.2d 767 (Ind. 1997) (*Hoovler I*) (Appendix pp. 31-47).

2. *Charles A. Hoovler, et al. v. State of Indiana, et al.*, 689 N.E.2d 738 (Ind. App. 1997) (*Hoovler II*) (Appendix pp. 1-17).

JURISDICTION

The judgment sought to be reviewed in this matter was issued by the Indiana Court Of Appeals on December 17, 1997 in a published opinion (Appendix, p. 1) which affirmed a judgment of the Tippecanoe Circuit Court entered on April 25, 1997. (Appendix, p. 18) The Indiana Supreme Court denied petitioner's (collectively referred to as "Hoovler") Petition for Transfer on March 3, 1998. (Appendix p. 29)

This matter involves an important question of federal constitutional law. The United States Supreme Court has jurisdiction over this matter pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS, STATUTES AND LEGISLATIVE ACTS INVOLVED IN THIS CASE

1. SECTION 1 OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

. . . No state shall make or enforce any law which shall abridge the privileges or immunities

of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. INDIANA CODE §6-3.5-7-5

(a) Except as provided in subsection (c), the county economic development income tax may be imposed on the adjusted gross income of county taxpayers. The entity that may impose the tax is:

(1) The county income tax council (as defined in IC 6-3.56-1) if the county option income tax is in effect on January 1 of the year the county economic development income tax is imposed;

(2) The county council if the county adjusted gross income tax is in effect on January 1 of the year the county economic development tax is imposed; or

(3) The county income tax council or the county council, whichever acts first, for a county not covered by subdivision (1) or (2).

To impose the county economic development income tax, a county income tax council shall use the procedures set forth in IC 6-3.5-6 concerning the imposition of the county option income tax.

(b) Except as provided in subsections (c) and (g), the county economic development income tax may be imposed at a rate of:

(1) One-tenth percent (0.1%);

(2) Two-tenths percent (0.2%);

(3) Twenty-five hundredths percent (0.25%);

(4) Three-tenths percent (0.3%);

(5) Thirty-five hundredths percent (0.35%);

(6) Four-tenths percent (0.4%);

(7) Forty-five hundredths percent (0.45%); or

(8) Five-tenths percent (0.5%);

on the adjusted gross income of county taxpayers.

(c) The county economic development income tax rate plus the county adjusted gross income tax rate, if any, that are in effect on January 1 of a year may not exceed one and twenty-five hundredths percent (1.25%).

Except as provided in subsection (g), the county economic development tax rate plus the county option income tax rate, if any, that are in effect on January 1 of a year may not exceed one percent (1%).

(d) To impose the county economic development income tax, the appropriate body must, after January 1 but before April 1 of a year, adopt an ordinance. The ordinance must substantially state the following:

"The _____ County _____ imposes the county economic development income tax on the county taxpayers of _____ County. The county economic development income tax is imposed at a rate of _____ percent (_____%) on the county taxpayers of the county. This tax takes effect July 1 of this year."

(e) Any ordinance adopted under this section takes effect July 1 of the year the ordinance is adopted.

(f) The auditor of a county shall record all votes taken on ordinances presented for a vote under the authority of this section and immediately send a certified copy of the results to the department by certified mail.

(g) This subsection applies to a county having a population of more than one Hundred twenty-nine thousand (129,000) but less than one hundred thirty thousand, six hundred (130,600). In addition to the rates permitted by §(b), the:

(1) County economic development income tax may be imposed at a rate of:

(A) Fifteen-hundredths percent (0.15%);

(B) Two-tenths percent (0.2%); or

(C) Twenty-five hundredths percent (0.25%); and

(2) County economic development income tax rate plus the county option income tax rate that are in effect on January 1 of a year may equal up to one and twenty-five hundredths percent (1.25%);

if the county income tax council makes a determination to impose rates under this subsection and section 22 [I.C. 63.5-7-22] of this chapter.

3. Public Law 44-1994

See Appendix, page 63. (Indiana Code §6-3.5-7-5(h) originally added by P.L. 44-1994 has been redesignated as subsection (g).)

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

This matter has been certified as a class action on behalf of income tax payers in Tippecanoe County, Indiana. (Appendix, p. 53, paras. 8, 10) On May 9, 1995, the Tippecanoe Circuit Court made special findings of fact in 15 paragraphs which were not challenged on appeal. (Appendix, pp. 48-51) In a judgment of April 25, 1997, after remand from the Indiana Supreme Court, the Tippecanoe Circuit Court restated the same 15 paragraphs of its original findings of fact and added a new paragraph 16. (Appendix, pp. 18-22, 27-28) The facts relevant to the issues presented for review as specially found by the Tippecanoe Circuit Court are the following:

> 1. On March 2, 1997, the Indiana General Assembly enacted Public Law 44-1994 (HEA 1398), and on March 17, 1994, P.L. 44-1994 was signed into law by Governor Evan Bayh.
>
> 2. P.L. 44-1994 authorized the county income tax council of a county "having a population of more than one hundred twenty-nine thousand (129,000) but less than one hundred thirty-thousand six hundred (130,600)" (P.L. 44-1994, Section 6(h)) to impose a county economic development income tax rate which, when added to the county option income tax rate for that county equals "up to one and twenty-five hundredths percent (1.25%)" (P.L. 44-1994, Sec. 6(h)(2)), if the county income tax money is needed in the county to fund substance removal or remedial action, and the actions taken to fund substance removal and

remedial action serve a public purpose by promoting public health, welfare and safety. (P.L. 44-1994, Sec. 10(b)).

3. Based on the 1990 United States census, Tippecanoe County is presently the only county that comes within the population classification established by P.L. 44-1994, Section 6(h). Madison County, with an official population of 130,699 and Porter County, with an official population of 128,932, are presently excluded from the classification, as are all other counties in Indiana.

4. P.L. 44-1994 allows the county income tax council of a county that falls within the population classification of 129,000 to 130,600 to impose a higher rate of tax than that which counties outside the population classification may impose pursuant to Ind. Code §6-3.5-7-5.

5. The Tippecanoe County Sanitary Landfill ("Landfill") is a privately owned landfill in Tippecanoe County, Indiana, and has been placed on the U.S. National Priorities List by the United States Environmental Protection Agency ("U.S.E.P.A."). Potentially Responsible Parties ("PRPs") may be required to pay the cost of the cleanup of the Landfill by the U.S.E.P.A. or may do the necessary cleanup at their expense. Tippecanoe County, the City of Lafayette, the City of West Lafayette, Purdue University and a number of private businesses have been designated as PRPs by the U.S.E.P.A.

6. The Tippecanoe County Income Council has made a determination that economic development income tax money is needed in the county to fund substance removal and remedial action, including the repayment of bonds or

other debt incurred for substance removal and remedial action pursuant to P.L. 44-1994, Sec. 10(b) and has adopted an ordinance increasing the Tippecanoe economic development income tax by 1.25%, pursuant to P.L. 44-1994, Sec. 6(h)(2).

7. The ordinance of the Tippecanoe County Income Tax Council adopted by the Local Governments provides that the economic income tax money collected pursuant to the rate of increase is needed in Tippecanoe County "to fund substance removal and remedial action, including the repayment of bonds or other debt incurred for substance removal and remedial action."

8. Neither P.L. 44-1994 nor the ordinance of the Tippecanoe County Income Tax Council makes reference to the Landfill or the purposes for which the funds generated by the tax rate will be expended.

9. The goal of P.L. 44-1994 is to provide a funding mechanism through a county economic development tax to pay for substance removal and remedial action.

10. The Indiana Department of State Revenue is the agency of state government designated to collect the county economic development income tax. It has no other role in the administration of law.

11. Tippecanoe County is the only county in Indiana where the county and other local governments have been identified by the U.S.E.P.A. as operators of a "Superfund" site, the Landfill, and, therefore, are potentially responsible parties for cleanup of the site.

12. The Landfill does not require removal of toxic industrial wastes but requires the completion of an impermeable cover and a leachate collection system. The problems of the Landfill are those of a typical sanitary landfill that has not been properly closed.

13. The situation regarding the cleanup of the Landfill is unique in that the PRPs are cooperating in the funding of the cleanup.

14. If the U.S.E.P.A. accepts the proposal of the PRPs, the costs of cleanup may be minimized. If the proposal cannot go forward because the funding mechanism for the cleanup is not in place, the cost of the cleanup may increase.

15. Under the Superfund law, if the potentially responsible parties do not agree on a method for cleanup within 120 days following the issuance of the U.S.E.P.A.'s record of the decision, the U.S.E.P.A. will undertake the cleanup and ultimately seek reimbursement for the cleanup from the PRPs.

16. The only evidence before the Court is that the proceeds of the tax will be used to finance the cleanup of the Tippecanoe County Landfill. However, P.L. 44-1994 does not require the use of the tax revenues collected for substance removal or remedial action at the Landfill, nor does it limit the use of the tax revenues collected to substance removal or remedial action at the Landfill.

(Appendix, pp. 18-22) (A typographical error in paragraph 16 was corrected on May 9, 1997 *nunc pro tunc*.) (Appendix pp. 27-28)

B. FEDERAL QUESTION RAISED BELOW

The federal question of whether P.L. 44-1994 is contrary to the equal protection clause of the Fourteenth Amendment was first raised by the Petitioners Charles A. Hoovler, et al., and the class they represent (collectively referred to as "Hoovler"), in Count II of their original complaint filed April 15, 1994 in the Tippecanoe Circuit Court. (Appendix, pp. 86-89) Paragraph 11 of Count II of the original Complaint expressly alleged that the act in question violated the equal protection clause. (Appendix, p. 88) This issue also was raised as issue I.B. in Hoovler's May 28, 1997 Brief of Appellants to the Indiana Court of Appeals (Appendix, p. 90) and was extensively discussed on pages 16 through 22 of the May 28, 1997 Brief of Appellants (Appendix, pp. 91-97) and on pages 8 through 11 of Hoovler's June 26, 1997 Reply Brief of Appellants filed with the Indiana Court of Appeals. (Appendix, pp. 98-101) This issue also was raised in paragraph 4.C. on page 2 of Hoovler's December 24, 1997 Petition for Transfer to the Indiana Supreme Court (Appendix, p. 104) and on pages 2 through 4 of Hoovler's December 24, 1997 Brief in Support of Petition for Transfer filed with the Indiana Supreme Court. (Appendix, pp. 106-108)

C. DISPOSITION OF FEDERAL QUESTION BELOW

On April 25, 1997 the Tippecanoe Circuit Court determined that Hoovler's equal protection argument was without merit. (Appendix, pp. 22, 25-26) On December 17, 1997, the Indiana Court of Appeals issued a published written opinion that the act in question did not violate the equal protection clause. *Hoovler v. State*, 689 N.E.2d

738, at 742-744 (Ind. App. 1997) (*Hoovler II*); (Appendix, pp. 1, 8-12) On March 3, 1998 the Indiana Supreme Court denied Hoovler's petition for transfer of this case to the Indiana Supreme Court. (Appendix, pp. 29-30)

REASONS FOR GRANTING THE WRIT

Review on writ of certiorari should be granted under Supreme Court Rule 10(b) and (c). As shown below, an Indiana court of last resort has decided an important question of federal constitutional law in a way that conflicts with relevant decisions of the United States Supreme Court and in a way that conflicts with the decisions of other state courts of last resort. Alternatively, an Indiana court of last resort has decided an important question of federal constitutional law that has not been, but should be, settled by the United States Supreme Court.

A. AN INDIANA COURT OF LAST RESORT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THE UNITED STATES SUPREME COURT.

The equal protection clause of the Fourteenth Amendment commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The Supreme Court has decided that where a state makes a classification, the equal protection clause requires that the classification rationally further a legitimate state interest. *Nordlinger v. Hahn*, 505 U.S. 1, 112

S.Ct. 2326, 120 L.Ed.2d 1 (1992). The Supreme Court also has decided that the equal protection clause requires that a classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the differences in classification, as to be wholly arbitrary. *Walters v. St. Louis*, 347 U.S. 231, 74 S.Ct. 505, 98 L.Ed. 660 (1954).

Also, in *Railway Express Agency v. New York*, 336 U.S. 106, 112, 69 S.Ct. 463, 93 L.Ed. 533, 540 (1949) Mr. Justice Jackson wrote:

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws will be equal in operation. 336 U.S. at 112.

The goal of P.L. 44-1994 is to provide a funding mechanism through a county economic development income tax to pay for substance removal and remedial action. (Appendix, p. 21, para. 9; *Hoovler II*, 689 N.E.2d at 742, 744; Appendix, pp. 7, 13) It is apparent on the face of P.L. 44-1994 that the population classification at issue bears no rational relationship to the purpose of funding

substance removal and remedial action. This was decided in *Hoovler I* by the Indiana Supreme Court which said:

> If we limit our consideration to the statute's population language, the trial court is correct in concluding that by using the population range method of identifying eligible counties, the statute has created a special legislative classification that fails to bear a rational relationship to the subject matter in question and the reason for which does not inhere in the statute. *Hoovler I*, 668 N.E.2d at 1234. (Appendix, p. 42)

In *Hoovler II* the Indiana Court of Appeals decided that P.L. 44-1994 is not contrary to the equal protection clause even though the population limit furthers no legitimate state interest and is not rationally related to the subject matter of the act. *Hoovler II*, 689 N.E.2d 742-44; Appendix, pp. 8-12. This decision of the Indiana Court of Appeals is clearly contrary to previous decisions of the United States Supreme Court in *Nordlinger v. Hahn* and *Walters v. St. Louis*.

The decision of the Indiana Court of Appeals also is contrary to the following previous decisions of the United States Supreme Court, all of which struck down tax related classifications which failed to rationally further a legitimate governmental interest: *Allegheny Pittsburgh Coal Co. v. Webster County*, 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989) (disparate assessment of recently sold real estate); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 105 S.Ct. 2862, 86 L.Ed.2d 487 (1985) (exemption only for veterans who were residents prior to certain date); *Williams v. Vermont*, 472 U.S. 14, 105 S.Ct. 2465, 86 L.Ed.2d 11 (1985) (auto sales tax credit); *Metropolitan Life v. Ward*,

470 U.S. 869, 105 S.Ct. 1676, 84 L.Ed.2d 751 (1985) (out-of-state insurance companies taxed at higher rate).

Instead of following the decisions of the Supreme Court, the Indiana Court of Appeals ruled that P.L. 44-1994 was not contrary to the equal protection clause because Tippecanoe County is unique. *Hoovler II*, 689 N.E.2d at 742-44; Appendix, pp. 8-12. Uniqueness never has been relevant to equal protection analysis under previous decisions of the Supreme Court. Under the above cases, a classification must rationally further a legitimate governmental interest, regardless of whether the disparately treated class is unique. Thus, the Indiana Court of Appeals has improperly created an exception to the rational basis test based on uniqueness which is contrary to the Supreme Court's previous relevant decisions.

Also, the Indiana Court of Appeals concluded that the classification in P.L. 44-1994 was related to a unique state interest in funding substance removal and remedial action at the privately owned Tippecanoe Sanitary Landfill. *Hoovler II*, 689 N.E.2d at 742 44; Appendix, pp. 8-12. However, P.L. 44-1994 does not refer to Tippecanoe County, the landfill or the purposes for which the tax funds will be expended. (Appendix, p. 21, para. 8; pp. 63-85) The act does not require the use of the tax revenues collected for substance removal and remedial action at the landfill and does not limit the use of the tax revenues to substance removal and remedial action at the landfill. (Appendix, p. 27) Also, the landfill does not require substance removal. (Appendix, p. 21, para. 12) Therefore, the classification as written is not reasonably tailored to the State's claimed purpose and does not rationally further funding substance removal and remedial action at the

landfill. Thus, the decision in *Hoovler II* is contrary to the above cited Supreme Court opinions for this reason as well. *See Hooper v. Bernalillo County Assessor, supra* (invalidating classification where statute as written was not rationally related to asserted legislative goal).

Therefore, a writ of certiorari should be granted pursuant to Supreme Court Rule 10(c).

B. AN INDIANA COURT OF LAST RESORT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW IN A WAY THAT CONFLICTS WITH THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT

The opinion of the Indiana Court of Appeals in *Hoovler II* is contrary to the decisions of other state courts of last resort which have concluded that arbitrary population limits violate the equal protection clause. *See, Palcek v. City of Chicago Heights,* 393 N.E.2d 1218 (Ill. App. 1979) (arbitrary population classifications would violate equal protection clause); *Norris v. Seibels,* 353 So.2d 1165 (Ala. 1977) (arbitrary population classification violated equal protection clause); *Peddycoart v. City of Birmingham,* 354 So.2d 808 (Ala. 1978) (arbitrary population classification violated equal protection clause); *Bayou Barber College, Inc. v. Mincey,* 193 So.2d 610 (Fla. 1967) (arbitrary population limit violated equal protection clause). Therefore, the issuance of a writ of certiorari is appropriate under Supreme Court Rule 10(b).

C. ALTERNATIVELY, AN INDIANA COURT OF LAST RESORT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE UNITED STATES SUPREME COURT

In the alternative, this case raises important questions of federal constitutional law that have not been, but should be, settled by the United States Supreme Court. The most important specific question that the Supreme Court should answer is whether the equal protection clause prohibits the states from using arbitrary population limits to classify political subdivisions. This question is very important because political subdivisions are frequently classified by population throughout the United States. Many examples showing the nationwide use of population limits are discussed in Annot., *Validity of Statutory Classification Based on Population – Tax Statutes*, 98 A.L.R.3d 1083 (1980); Annot., *Validity of Statutory Classification Based on Population – Government Employee Salary or Pension Statutes*, 96 A.L.R.3d 538 (1980); Annot., *Validity of Statutory Classification Based on Population – Intoxicating Liquor Statutes*, 100 A.L.R.3d 850 (1980); Annot., *Validity of Statutory Classification Based on Population – Zoning, Building and Land Use Statutes*, 98 A.L.R.3d 679 (1980); Annot., *Validity of Statutory Classification Based on Population – Jury Selection Statutes*, 97 A.L.R.3d 434 (1980); 56 Am.Jur.2d *Municipal Corporations, Counties and Other Political Subdivisions* §106 (1971).

The Indiana Supreme Court has permitted the use of doubtful population classifications as a means to evade state constitutional prohibitions against special and local

laws. *See e.g. Hoovler I,* 668 N.E.2d at 1236 (J. Sullivan, concurring); *Indiana Gaming Comm'n v. Moseley,* 643 N.E.2d 296 (Ind. 1994); *North Township Advisory Bd. v. Mamala,* 490 N.E.2d 725 (Ind. 1986). As a result, the Indiana General Assembly has employed population classifications with great enthusiasm. Examples of sections of the Indiana Code which rely on population classifications as a subterfuge to identify specific political subdivisions are listed in Hoovler's Appendix at pp. 109-110. They include:

Indiana Code §6-1.1-18.5-13 pertaining to property tax controls which states:

> With respect to an appeal filed under section 12 [IC 6-1.1-18.5-12] of this chapter, the local government tax control board may recommend that a civil taxing unit receive any one (1) of more of the following types of relief:
>
> * * *
>
> (9) Permission to a civil taxing unit to increase the unit's levy in excess of the limitations established under section 3 of this chapter if the local government tax control board finds that:
>
> (A) The civil taxing unit is:
>
> (i) A county having a population of more than one hundred twenty-nine thousand (129,000) but less than one hundred thirty thousand six hundred (130,600);
>
> (ii) A city having a population of more than forty-three thousand seven hundred (43,700) but less than forty-four thousand (44,000);

(iii) A city having a population of more than twenty-five thousand five hundred (25,500) but less than twenty-six thousand (26,000);

(iv) A city having a population of more than fifteen thousand five hundred seventy (15,570); or

(v) A city having a population of more than five thousand six hundred fifty (5,650) but less than five thousand seven hundred eight (5,708); and

(B) The increase is necessary to provide funding to undertake removal (as defined in IC 13-7-8.7-1) and remedial action (as defined in IC 13-7-8.7-1) relating to hazardous substances (as defined in IC 13-7-8.7-1) in solid waste disposal facilities or industrial sites in the civil taxing unit that have become a menace to the public health and welfare . . .

Indiana Code §6-9-6-1 regarding a hotel and motel tax which states:

This chapter applies to a county having a population of more than one hundred seven thousand (107,000) but less than one hundred eight thousand (108,000).

Indiana Code §6-9-27-1 pertaining to a beverage tax which states:

This chapter applies to:

(1) A town:

(A) Located in a county having a population of more than fifty thousand (50,000) but less than sixty thousand (60,000); and

(B) Having a population of more than five thousand (5,000) but less than six thousand (6,000);

(2) A town:

(A) Located in a county having a population of more than twenty-eight thousand (28,000) but less than twenty-nine thousand five hundred (29,500); and

(B) Having a population of less than seven hundred (700);

(3) A town:

(A) Located in a county having a population of more than seventy-five thousand (75,000) but less than seventy-eight thousand (78,000); and

(B) Having a population of more than nine thousand (9,000); and

(4) A town:

(A) Located in a county having a population of more than seventy-five thousand (75,000) but less than seventy-eight thousand (78,000); and

(B) Having a population of more than seven thousand (7,000) but less than eight thousand (8,000).

Indiana Code §8-14-8-3 pertaining to distressed roads which states:

For the purpose of this chapter, "qualified county" means a county having a population of:

(1) More than forty-four thousand (44,000) but less than forty-five thousand (45,000);

(2) More than thirty-six thousand (36,000) but less than thirty-six thousand seven hundred (36,700);

(3) More than thirty-one thousand five hundred (31,500) but less than thirty-two thousand (32,000);

(4) More than twenty-seven thousand five hundred (27,500) but less than twenty-seven thousand six hundred (27,600);

(5) More than twenty-five thousand nine hundred fifty (25,950) but less than twenty-six thousand (26,000);

(6) More than nineteen thousand (19,000) but less than nineteen thousand three hundred (19,300);

(7) More than nineteen thousand three hundred (19,300) but less than nineteen thousand five hundred (19,500);

(8) More than eleven thousand (11,000) but less than twelve thousand six hundred (12,600);

(9) More than ten thousand (10,000) but less than eleven thousand (11,000);

(10) More than nine thousand five hundred (9,500) but less than ten thousand (10,000).

It is apparent from the above materials that population classifications have for many years significantly affected, and will continue to affect, millions of people in Indiana and throughout the United States. Whether states may use arbitrary population limits therefore is a question that exceeds in importance many others accepted by the Supreme Court. The argument that it is time for the

Supreme Court to provide guidance in the area of territorial discrimination also is well made in Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination,* 135 Pa.L.Rev. 261 (1987).

Indiana also has determined that the arbitrary population limits in P.L. 44-1994 are justified by the State's interest in avoiding the "staggering" costs of environmental cleanup that would be incurred under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §9601-9675. *Hoovler II,* 689 N.E.2d at 744 (Appendix, p. 12) Whether the effects of CERCLA can justify the use of arbitrary population limits for equal protection purposes is another important question of federal law which has not been, but should be, addressed by the Supreme Court.

This case also raises important questions regarding the process by which states make laws. Allowing states to arbitrarily subject localities to disparate treatment opens the door to hasty, inconsiderate or reckless legislative enactments. The constituents of most legislators voting for an act targeted at one locality will be unaffected and their representatives may pay little attention to it. Such an act likely will not be subjected to full and open debate which is highly valued in our democratic system as the best method to form public policy. Classification by arbitrary population limits used to identify specific localities also conceals the true purpose of an act. Although the State of Indiana now contends that the purpose of P.L. 44-1994 was to provide funding for landfill cleanup, anyone interested could not discern this purpose from the language of the act. Also, once such an act is in place, there may be no way to repeal it if it is found to be unjust

or unwise since most of the state will have no interest in it. Such an act also undermines the legitimacy of government since it is rightly perceived as a disingenuous subterfuge and the result of special influence. Using arbitrary population limits is simply a good way to make bad laws that discriminate against minorities for no apparent legitimate reason. Therefore, the Supreme Court should declare that the use of arbitrary population limits is incompatible with the Fourteenth Amendment.

A writ of certiorari therefore should be granted under Supreme Court Rule 10(c).

CONCLUSION

For foregoing reasons, the petition for writ of certiorari should be granted.

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FOR PUBLICATION

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IN THE
COURT OF APPEALS OF INDIANA

CHARLES A. HOOVLER, LINDA L. OKOS, MARTIN OKOS, PATRICIA ANN PALMER, ROBERT M. STWALLEY, III, and JEFF SYMMES, Individually and as Representatives for and on behalf of all other taxpayers similarly situated,	)	No. 79A02-9705-CV-312
Appellants-Plaintiffs,	)	
vs.	)	
STATE OF INDIANA, INDIANA DEPARTMENT OF REVENUE,	)	
Appellees-Defendants.	)	

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Jeffrey R. Smith, Special Judge
Cause No. 79C01-9404-CP-125

December 17, 1997

OPINION – FOR PUBLICATION

KIRSCH, Judge

Appellants-plaintiffs, Charles A. Hoovler, Linda L. Okos, Martin Okos, Patricia Ann Palmer, Robert M. Stwalley, III, and Jeff Symmes, individually and as representatives for and on behalf of all other taxpayers similarly situated (collectively, "the taxpayers"), challenge the constitutionality of P.L. 44-1994, legislation that authorizes an increase in the economic development income tax in Indiana counties and cities falling within certain narrowly-defined population ranges.

We affirm.

FACTS AND PROCEDURAL HISTORY

P.L. 44-1994 allows Indiana counties with a population between 129,000 and 130,600 to increase their economic development income tax rate. Tippecanoe County is currently the only county in Indiana to fall within the stated population range.[1] The taxpayers are Tippecanoe County residents, certified as a class for purposes of this

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[1] P.L. 44-1994 also permits cities with a population between 5,650 and 5,708 to increase their economic development income tax rate. All of the taxpayers arguments to the trial court, and all but one of their arguments on appeal, concern the county population classification. Both population classifications have the same effect, that is, to treat residents of certain localities differently for tax purposes. Thus, while the focus of the taxpayers' arguments, and, hence, the focus of our discussion, is on the county population classification, the same principles apply to the city population classification.

lawsuit, who claim that P.L. 44-1994 violates several of their state and federal constitutional rights. On May 9, 1995, the Tippecanoe Circuit Court declared the statute unconstitutional, finding that it was a local and special law providing for the assessment and collection of taxes for county purposes in violation of Article IV, Sections 22 and 23 of the Indiana Constitution.

The State appealed directly to the Indiana Supreme Court which reversed the trial court and remanded the matter for further proceedings. *State v. Hoovler*, 668 N.E.2d 1229 (Ind. 1996), *motion to strike portions of reh'g brief granted*, 673 N.E.2d 767 (Ind. 1997) (*"Hoovler I"*). The supreme court held that P.L. 44-1994 did not violate Article IV, Section 22 because the statute did not provide for the assessment and collection of taxes. *Id.* at 1233. The court further held that, although P.L. 44-1994 was a special law, it did not violate Article IV, Section 23 because it was not amenable to a law of general application. *Id.* at 1235.

The factual background of this case is set forth in the trial court's fifteen findings of fact entered in connection with its first judgment and are quoted fully in *Hoovler I.* 668 N.E.2d at 1231-32. On remand, the trial court entered the following additional finding of fact:

> "16. The only evidence before the Court is that the proceeds of the tax will be used to finance the cleanup of the Tippecanoe County Landfill. However, P.L. 44-1994 does not require the use of the tax revenues collected for substance removal or remedial action at the Landfill, nor does it limit the use of the tax revenues

collected to substance removal or remedial action at the Landfill."

Record at 122 (as amended nunc pro tunc). The trial court then upheld the constitutionality of P.L. 44-1994 and entered judgment in favor of the State.

ISSUES

On appeal, the taxpayers challenge the trial court's conclusion that P.L. 44-1994 does not violate any of the following constitutional provisions:

I. Article IV, Section 19 of the Indiana Constitution which requires that legislative acts be confined to one subject.

II. The Fourteenth Amendment to the United States Constitution which guarantees equal protection of the laws.

III. Article I, Section 23 of the Indiana Constitution which guarantees equal privileges and immunities to Indiana's citizens.

IV. Article IV, Section 22 of the Indiana Constitution which prohibits special and local laws regulating county business.

V. Article XI, Section 13 of the Indiana Constitution which prohibits special laws forming corporations.

STANDARD OF REVIEW

"Whether a statute, particularly a tax statute, is wise or expedient is for the legislature to decide, not the courts." *Taxpayers Lobby of Indiana, Inc. v. Orr*, 262 Ind. 92,

97, 311 N.E.2d 814, 816 (1974). When considering the constitutionality of a statute, we accord it every reasonable presumption of validity. *Ledbetter v. Hunter*, 652 N.E.2d 543, 545 (Ind. Ct. App. 1995). All doubts are resolved against a challenger who must overcome that presumption by "clearly demonstrating the provision to be invalid." *Hoovler I*, 668 N.E.2d at 1232.

I. ARTICLE IV, SECTION 19: SINGLE-SUBJECT REQUIREMENT

Article IV, Section 19 of the Indiana Constitution provides: "An act, except an act for the codification, revision or rearrangement of laws, shall be confined to one subject and matters properly connected therewith." This constitutional provision is intended to guarantee that there is "some rational unity between the matters embraced in the act." *In re Estate of Wisely*, 402 N.E.2d 14, 16 (Ind. Ct. App. 1980) (quoting *State ex rel. Test v. Steinwedel*, 203 Ind. 457, 468, 180 N.E. 865, 868 (1932) and *Ule v. State*, 208 Ind. 255, 266, 194 N.E. 140, 144 (1935)). "[I]f there is any reasonable basis for grouping together in one act various matters of the same nature, and the public cannot be deceived reasonably thereby, the act is valid." *Stith Petroleum Co. v. Department of Audit and Control*, 211 Ind. 400, 409, 5 N.E.2d 517, 521 (1937).

Article IV, Section 19 was included in the Constitution to protect the legislative process against political log-rolling, "where legislators combine two unrelated bills, each without sufficient support to pass on its own, in order to accumulate the requisite number of votes to pass both." *Pence v. State*, 652 N.E.2d 486, 489 (Ind. 1995)

(Dickson, J., dissenting); *see also Jackson v. State ex rel. South Bend Motor Bus Co.*, 194 Ind. 248, 252, 142 N.E. 423, 424 (1924). We agree with the State that there was no evidence presented or even an allegation made of political log-rolling here. The Record reflects that P.L. 44-1994 was enacted as a unitary bill, not as a combination of two unrelated bills.

Despite the lack of political log-rolling, the taxpayers contend that P.L. 44-1994 violates the single-subject requirement in two respects. First, they argue that P.L. 44-1994 impermissibly combines two separate local laws because it contains two population classifications: one applicable to counties with populations between 129,000 and 130,600, and one applicable to cities with populations between 5,650 and 5,708. Second, the taxpayers argue that P.L. 44-1994 violates the single-subject requirement because it contains provisions that amend Title 6 of the Indiana Code regarding taxation and separate provisions that amend Title 36 regarding local government.

The taxpayers' contentions are based upon an overly strict interpretation of Article IV, Section 19. Our supreme court has given Article IV, Section 19 a much more liberal interpretation as reflected in its recent statement that "[t]he single subject provisions of the Constitution are designed to promote fair practice in legislating without much judicial intervention." *Bayh v. Indiana State Bldg. and Constr. Trades Council*, 674 N.E.2d 176, 179 (Ind. 1996). Such an observation undoubtedly arose from cases in which legislation containing tenuously related subjects has survived a single subject challenge. *See Dague v. Piper Aircraft Corp.*, 275 Ind. 520, 530-32, 418 N.E.2d 207, 213-15

(1981) (upholding constitutionality of legislation combining the Product Liability Act with twenty-eight amendments to Title 33 of the Indiana Code concerning courts and court officers). In conformity with the supreme court's "laissez-faire" approach to single-subject cases, this court has recently upheld legislation combining the reformation of the Indianapolis Public Schools with the State's budget. *Indiana State Teachers Ass'n v. Board of School Commr's of Indianapolis*, 679 N.E.2d 933, 935 (Ind. Ct. App. 1997).

The taxpayers' single-subject argument is also based upon an overly technical characterization of P.L. 44-1994. For purposes of Article IV, Section 19, the term "subject" has been held to mean "the thing about which the legislation is had." *Estate of Wisely*, 402 N.E.2d at 16. The thing about which P.L. 44-1994 is had, is the funding of remedial action and substance removal. "Matters" for Article IV, Section 19 purposes are "the incident or secondary things necessary to provide for [the subject's] complete enforcement." *Id.* The matters of P.L. 44-1994 are the authorization of the increased tax and the creation of local governmental bodies to impose such tax. The increased tax is properly connected to the funding of remedial action and substance removal because it is the means to carry out the funding's complete enforcement. The provisions of P.L. 44-1994 are not less unrelated, and are perhaps more related, than legislation that combines the Product Liability Act with amendments to the Indiana Code for courts and court officers, and than legislation combining the reformation of Indianapolis Public Schools with the State's budget. We hold that P.L. 44-1994 satisfies

the single-subject requirement found in Article IV, Section 19 of the Indiana Constitution.

II. FOURTEENTH AMENDMENT: EQUAL PROTECTION

The taxpayers next argue that the classifications created in P.L. 44-1994, both by the population parameters and by a provision limiting the legislation's applicability to qualified sites existing as of July 1, 1994, are not rationally related to any legitimate government interest.

Accordingly, argue the taxpayers, P.L. 44-1994 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The State responds that any tax classification made in P.L. 44-1994 has already been determined by the supreme court to be rational, and the taxpayers are bound by the law of the case.

The law of the case doctrine "mandates that an appellate court's determination of a legal issue binds both the trial court and the court on appeal in any subsequent appeal involving the same case and relevantly similar facts." *St. Margaret Mercy Healthcare Centers, Inc. v. Ho.* 663 N.E.2d 1220, 1223 (Ind. Ct. App. 1996). The doctrine's purpose is "to minimize unnecessary relitigation of legal issues resolved by an appellate court[.]" *Id.* Relitigation is barred for all issues decided "directly or by implication in a prior decision[.]" *Certain Northeast Annexation Area Landowners v. City of Fort Wayne*, 622 N.E.2d 548, 549 (Ind. Ct. App. 1993), *trans. denied.*

It is true that the supreme court talked in terms of a rational relationship between classifications made in P.L. 44-1994 and the subject matter of the legislation. *Hoovler I*, 668 N.E.2d at 1234. This discussion, however, was had in connection with the taxpayers' Article IV, Section 23 claim presented in the first appeal. The equal protection issue was not addressed or decided in *Hoovler I*, either directly or by implication. Accordingly, the law of the case doctrine does not apply, and we address the taxpayers' equal protection claim.

The equal protection guarantee prohibits states from denying "to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV § 1. When reviewing a state statute to determine whether it violates the Equal Protection Clause, the level of scrutiny used depends upon the classification made in the challenged statute. *Clifft v. Indiana Dep't of State Revenue*, 641 N.E.2d 682, 689 (Ind. Tax 1994), *aff'd in part and rev'd in part on other grounds*, 660 N.E.2d 310 (Ind. 1995). If the classification involves neither a suspect class nor a fundamental right, the level of scrutiny used is the rational basis test, that is, "the legislation will pass constitutional muster if the classification is 'rationally related to a legitimate government purpose.' " *Id.* (quoting *Pazzaglia v. Review Bd.*, 608 N.E.2d 1375, 1377 (Ind. Ct. App. 1993), *trans. denied*).

The taxpayers do not allege that the classifications made in P.L. 44-1994 involve either a suspect class or a fundamental right. Therefore, we examine the legislative classification using the rational basis test.

One of the premises underlying the supreme court's decision in *Hoovler I*, is that Tippecanoe County is in a situation unlike any other Indiana County, 668 N.E.2d at 1235. The trial court also found that the situation regarding the cleanup of Tippecanoe County's landfill was "unique." *Record* at 122 (Finding of Fact No. 13). The presence of a unique situation has been held to justify the use of legislative classifications for tax purposes. In *J & J Vending, Inc. v. Indiana Dep't of State Revenue*, 673 N.E.2d 1203 (Ind. Tax 1996), *trans. denied*, our tax court considered whether the equal protection clause was violated by a classification that subjected vending machine sales to an excise tax from which the sale of identical items in convenience and grocery stores was exempt. The court noted that the purpose of the classification was to aid "the less fortunate among us without foregoing the substantial tax revenue associated with the sale of meals and snacks to the community at large." *Id.* at 1207. By exempting staple items purchased while grocery shopping rather than through a vending machine, the legislation "better target[s] the less well-off" who are more likely to use their "limited resources" to buy such staples and use them over a long period of time, than to purchase "single-serving, prepackaged items." *Id.* at 1208. In holding that the classification was reasonable, the court noted that the equal protection clause "does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Id.* (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S. Ct. 2326, 2331, 120 L. Ed. 2d 1 (1992)). The court determined that because vending machine sales are not in all relevant respects like convenience and grocery store sales, the

classification was constitutional. "In the absence of evidence that J & J has been treated differently from other vending machine operators, this Court finds no violation of J & J's federal equal protection guarantees." *Id.*

The same reasoning applies here. Tippecanoe County is not in all relevant respects like any other county in Indiana. It is the only locality in Indiana to have a landfill that the United States Environmental Protection Agency (U.S.E.P.A.) has listed on the U.S. National Priorities List. *Record* at 120 (Finding of Fact No. 5). In addition, "Tippecanoe County is the only county in Indiana where the county and other local governments have been identified by the U.S.E.P.A. as operators of a 'Superfund' site, the Landfill, and, therefore, are potentially responsible parties for the cleanup of the site." *Record* at 121-22 (Finding of Fact No. 11). "The situation regarding the cleanup of the Landfill is unique in that the [potentially responsible parties] are cooperating in the funding of the cleanup." *Record* at 122 (Finding of Fact No. 13). Furthermore, there is no evidence that any Tippecanoe County taxpayer is being treated differently from any other Tippecanoe County taxpayer.

Outside the tax arena, our supreme court has upheld legislation that treated residents of one county differently from residents of other counties for purposes of voting on referenda concerning whether to allow riverboat gambling in the voters' respective communities. *Indiana Gaming Comm'n v. Moseley*, 643 N.E.2d 296 (Ind. 1994). In determining that the legislation did not violate principles of equal protection, the supreme court noted that "the state has an interest in ensuring votes to those most

affected by the introduction of gambling into their communities." *Id.* at 305.

The State has an analogous interest here. The residents of Tippecanoe County had more potential exposure to Superfund liability than the residents of any other Indiana county because Tippecanoe County is the site of the only identified Superfund site in Indiana and the only one in which local governmental entities have been identified as operators. The State has an interest in limiting that exposure by providing the governmental operators who have been identified as potentially responsible parties with the tools to further their cooperative efforts in the cleanup process. Singling out Tippecanoe County residents to pay a higher tax to guard against the "staggering" cleanup costs that would result from the potentially responsible parties' lack of cooperation is rationally related to that interest. *See Hoovler I*, 668 N.E.2d at 1235. Thus, there is no equal protection violation.

III. ARTICLE 1, SECTION 23: EQUAL PRIVILEGES AND IMMUNITIES

Article I, Section 23 of the Indiana Constitution provides: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." The supreme court has determined that equal privileges and immunities claims brought under Article I, Section 23 are to be analyzed separately from claims brought under the equal protection clause of the Fourteenth Amendment. *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994). A Section 23 analysis uses a single standard

to determine whether a law violates the Indiana Constitution as opposed to a system of varying degrees of scrutiny depending on whether the classification involves a suspect class or a fundamental rights with a Fourteenth Amendment analysis. *Id.* at 80. That standard consists of two requirements:

> "First, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated."

Id. Courts must employ this standard while giving "substantial deference to legislative discretion." *Id.* The challenger's burden in "to negative every conceivable basis which might have supported the classification." *Id.* (*quoting Johnson v. St. Vincent Hosp. Inc.*, 273 Ind. 374, 392, 404 N.E.2d 585, 597 (1980)).

The disparate treatment accorded by P.L. 44-1994 is to permit higher taxes in Tippecanoe County in order to finance remedial action and substance removal. As required by the first step of the *Collins* analysis, this disparate treatment is reasonably related to inherent characteristics which distinguish the taxpayers. As stated above, the taxpayers are residents of the only county in Indiana with a Superfund site for which the county and other local governmental operators have been identified as potentially responsible parties and who are cooperating in the funding of the landfill cleanup. As the trial court found, Tippecanoe County is "unique," a fact that distinguished its residents from the residents of all other

Indiana counties. *Record* at 122 (Finding of Fact No. 13). Furthermore, the higher tax rate is imposed on all Tippecanoe County taxpayers thereby satisfying the second prong of the *Collins* analysis which requires that the disparate treatment be uniformly applicable and equally available to all persons similarly situated. P.L. 44-1994 does not violate Article I. Section 23 of the Indiana Constitution.

IV. ARTICLE IV, SECTION 22: SPECIAL AND LOCAL LAWS REGULATING COUNTY BUSINESS

The taxpayers contend that P.L. 44-1994 regulates county business in violation of Article IV, Section 22 of the Indiana Constitution. The State contends that the taxpayers argument is barred by the law of the case doctrine. We agree with the State.

As previously stated, the law of the case doctrine bars relitigation of all issues decided directly or by implication in a prior decision. *Certain Northeast Annexation Area Landowners*, 622 N.E.2d at 549. In *Hoovler I*, the supreme court considered whether P.L. 44-1994 contravened Article IV, Section 23 of the Indiana Constitution which requires that in all of the cases falling within any of the sixteen categories listed in Article IV, Section 22, including cases involving local or special laws regulating county business, and in "all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State." Thus, for purposes of determining whether a violation of Article IV, Section 23 had occurred, the court first had to determine whether P.L. 44-1994 fell within any of the Article

IV, Section 22 categories. For this purpose, the supreme court determined that "the challenged statute does not fall within any of the categories enumerated in Section 22." *Hoovler I*, 668 N.E.2d at 1234. These categories include special laws regulating county business. Thus, the supreme court directly decided that P.L. 44-1994 does not constitute a special law regulating county business as prohibited by Article IV, Section 22, and we are bound by that decision.[2]

V. ARTICLE XI, SECTION 13: SPECIAL LAWS FORMING CORPORATIONS

The taxpayers finally contend that the provisions of P.L. 44-1994 forming a local environmental response financing board and district unconstitutionally create a corporation in violation of Article XI, Section 13 of the Indiana Constitution which provides that "[c]orporations, other than banking, shall not be created by special Act, but may be formed under general laws." In support of their contention that this constitutional provision has been violated, the taxpayers rely on *Rosencranz v. City of Evansville*, 194 Ind. 499, 143 N.E. 593 (1924), in which our supreme court struck down legislation authorizing the creation of port cities, legislation that applied only to the

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[2] Justice Dickson wrote the lead opinion in which only Justice Selby concurred. Justices Sullivan and DeBruler, however, state in a concurring opinion that P.L. 44-1994 was a permissible general law. By so stating, Justices Sullivan and DeBruler implied that by virtue of being a general law, P.L. 44-1994 is not a special law. Accordingly, it could not fall within any of the categories of special laws listed in Article IV Section 22.

city of Evansville. The court stated that the creation of a corporation is determined not necessarily by any magic statutory language, but may be implied by the powers conferred on the entity.

> "If an act of a legislature confers special powers and privileges upon the residents or inhabitants of a particular district which cannot be exercised and enjoyed, and the purpose intended by the law carried into effect, without their acting in a corporate capacity, a corporation, to that extent, is created by implication."

Id. at 504, 143 N.E. at 595-96.

Despite this language in *Rosencranz*, later cases have upheld the creation of local entities for the purpose of public improvements. *See, e.g., Orbison v. Welsh*, 242 Ind. 385, 179 N.E.2d 727 (1962) (Indiana Port Commission); *Book v. State Office Bldg. Comm'n*, 238 Ind. 120, 149 N.E.2d 273 (1958) (State Office Building Commission); *In re Train Collision at Gary Ind.*, 654 N.E.2d 1137 (Ind. Ct. App. 1995) (Northern Indiana Commuter Transportation District), *trans. denied*. This court has recognized that although the supreme court has extended Article XI, Section 13 to reach municipal corporations, the court has declined to invalidate the creation of boards or commissions in light of the "constitutional framers intent to limit the application of Art. 11, § 13 to private corporations." *Train Collision at Gary*, 654 N.E.2d at 1145 (citing *Ennis v. State Highway Comm'n*, 231 Ind. 311, 108 N.E.2d 687 (1952)). P.L. 44-1994 created just such a board. The legislation does not violate Article XI, Section 13.

Affirmed.

BAKER, J., concurs.

SULLIVAN, J., concurs at to Parts I, III, and V and concurs in result as to Parts II and IV.

STATE OF INDIANA	)	IN THE TIPPECANOE
	)	CIRCUIT COURT
COUNTY OF TIPPECANOE	)	
	)	CAUSE NO. 79C01-9404-CP-125

CHARLES HOOVLER, et al.,
Plaintiffs

v.

STATE OF INDIANA, et al.,
Defendants

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

(Filed Apr. 25, 1997)

This matter originally came before the Court for trial on April 27, 1995. Plaintiffs were represented by Thomas Herr and Linda Nearing. Defendants were represented by Pamela Carter, Attorney General of Indiana, and Deputy Attorneys General Beth H. Henkel and Jon Laramore. No party presented additional evidence on April 27, 1995, but the parties stipulated that the testimony received and evidence admitted at the hearing held by this Court on March 1, 1995, would be deemed received and admitted at the trial on the merits of this case. These findings of fact, conclusions of law and judgment are based upon this evidence.

This Court issued its original findings of fact, conclusions of law and judgment on May 9, 1995. After appeal and remand, *State v. Hoovler*, 668 N.E.2d 1229 (Ind. 1996), *reh. denied and mot. to strike granted*, 673 N.E.2d 767 (Ind. 1997), this case came before the Court after additional briefing by the parties.

Having considered this matter on the merits, and being duly advised, the Court makes the following findings of fact, conclusions of law, and judgment:

Findings of Fact

The first 15 findings are identical to those entered after the trial in 1995.

1. On March 2, 1994, the Indiana General Assembly enacted Public Law 44-1994 (HEA 1398, and on March 17, 1994, P.L. 44-1994 was signed into law by Governor Evan Bayh.

2. P.L. 44-1994 authorizes the county income tax council of a county "having a population of more than one hundred twenty-nine thousand (129,000) but less than one hundred thirty-thousand six hundred (130,600)" (P.L. 44-1994, Section 6(h)) to impose a county economic development income tax rate which, when added to the county option income tax rate for that county equals "up to one and twenty-five hundredths percent (1.25%)" (P.L. 44-1994, Sec. 6(h)(2)), if the county income tax money is needed in the county to fund substance removal or remedial action, including the repayment of bonds or other debt incurred for substance removal or remedial action, and the actions taken to fund substance removal and remedial action serve a public purpose by promoting public health, welfare, and safety (P.L. 44-1994, Sec. 10(b)).

3. Based on the 1990 United States census, Tippecanoe County is presently the only county that comes within the population classification established by P.L.

44-1994, Section 6(h). Madison County, with an official population of 130,669 and Porter County, with an official population of 128,932, are presently excluded from the classification, as are all other counties in Indiana.

4. P.L. 44-1994 allows the county income tax council of a county that falls within the population classification of 129,000 to 130,600 to impose a higher rate of tax than that which counties outside the population classification may impose pursuant to Ind. Code § 6-3.5-7-5.

5. The Tippecanoe County Sanitary Landfill ("Landfill") is a privately owned landfill in Tippecanoe County, Indiana, and has been placed on the U.S. National Priorities List by the United States Environmental Protection Agency ("U.S.E.P.A."). Potentially Responsible Parties ("PRPs") may be required to pay the cost of the cleanup of the Landfill by the U.S.E.P.A. or may do the necessary cleanup at their expense. Tippecanoe County, the City of Lafayette, the City of West Lafayette, Purdue University, and a number of private businesses have been designated as PRPs by the U.S.E.P.A.

6. The Tippecanoe County Income Council has made a determination that economic development income tax money is needed in the county to find substance removal and remedial action, including the repayment of bonds or other debt incurred for substance removal and remedial action pursuant to P.L. 44-1994, Sec. 10(b) and has adopted an ordinance increasing the Tippecanoe County economic development income tax by 1.25% pursuant to P.L. 44-1994, Sec. 6(h)(2).

7. The ordinance of the Tippecanoe County Income Council adopted by the Local governments provides that

the economic income tax money collected pursuant to the rate increase is needed in Tippecanoe County "to fund substance removal and remedial action, including the repayment of bonds or other debt incurred for substance removal and remedial action."

8. Neither P.L. 44-1994 nor the ordinance of the Tippecanoe County Income Tax Council makes reference to the Landfill or the purposes for which the funds generated by the tax rate will be expended.

9. The goal of P.L. 44-1994 is to provide a funding mechanism through a county economic development tax to pay for substance removal and remedial action.

10. The Indiana Department of State Revenue is the agency of state government designated to collect the county economic development income tax. It has no other role in the administration of the law.

11. Tippecanoe County is the only county in Indiana where the county and other local governments have been identified by the U.S.E.P.A. as operators of a "Superfund" site, the Landfill, and, therefore, are potentially responsible parties for the cleanup of the site.

12. The Landfill does not require removal of toxic industrial wastes but requires the completion of an impermeable cover and a leachate collection system. The problems of the Landfill are those of a typical sanitary landfill that has not been properly closed.

13. The situation regarding the cleanup of the Landfill is unique in that the PRPs are cooperating in the funding of the cleanup.

14. If the U.S.E.P.A. accepts the proposal of the PRPS, [sic] the cost of the cleanup may be minimized. If the proposal cannot go forward because the funding mechanism for the cleanup is not in place, the cost of the cleanup may increase.

15. Under the Superfund law, if the potentially responsible parties do not agree on a method for cleanup within 120 days following the issuance of the U.S.E.P.A.'s record of the decision, the U.S.E.P.A. will undertake the cleanup and ultimately seek reimbursement for the cleanup from the PRPS [sic].

16. The only evidence before the Court is that the proceeds of the tax will be used to finance the cleanup of the Tippecanoe County Landfill. However, P.L. 44-1994 does require the use of the tax revenues collected for substance removal or remedial action at the Landfill, nor does it limit the use of the tax revenues collected to substance removal or remedial action at the Landfill.

Conclusions of law

1. P.L. 44-1994 does not violate the federal Equal Protection Clause, the federal Due Process Clause, or Article 1, Section 23 of the Indiana Constitution (the Indiana Equal Protection Clause).

2. P.L. 44-1994 does not violate any portion of Article 4, Section 22 of the Indiana Constitution.

3. P.L. 44-1994 does not violate Article 4, Section 23 of the Indiana Constitution.

4. P.L. 44-1994 does not violate Article 11, Section 13, of the Indiana Constitution.

5. P.L. 44-1994 does not violate Article 4, Section 19 of the Indiana Constitution.

Rationale of the Court

At the trial of this cause, the primary focus was upon whether or not P.L. 44-1994 was a special law in violation of Article IV, Section 22 and Section 23 of the Indiana Constitution. The Plaintiffs argued vigorously that it was a special law while the State argued, with equal vigor, that it was not. This Court found:

a. P.L. 44-1994 was a special law;

b. P.L. 44-1994 provided for the assessment and collection of taxes in violation of Article IV, Section 22; and

c. The special or local problems address [sic] by P.L. 44-1994 could be resolved through a general law of uniform operation throughout the State, i.e. a law that included all counties having an EPA Superfund site and governmental unit PRPs, now or in the future.

Upon appeal, the Indiana Supreme Court agreed with the trial court's conclusion that P.L. 44-1994 was a special law finding that the legislature "intended the statute to apply exclusively to Tippecanoe County." The Supreme Court did not agree with the trial court's conclusion that the statute violated Article 4, Section 22[1] and

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[1] The General Assembly shall not pass local or special laws . . . [p]roviding for the assessment and collection of taxes for State, county, township, or road purposes.

Article 4, Section 23[2] of the Indiana Constitution. It found that, although P.L. 44-1994 provides for "a limited increase in the rate of existing taxes," it does not provide "for the assessment and collection of taxes." The Supreme Court also found that the trial court's proposed general law to address the subject matter of P.L. 44-1994 was a special law and that the funding of substance removal and remedial action in Tippecanoe County was not a case in which a general law could be made applicable.[3] The Indiana Supreme Court then reversed the trial court's judgment finding P.L. 44-1994 unconstitutional. The cause was then remanded for further proceedings consistent with the opinion of the Court.

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[2] In all cases enumerated in the preceding Section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State.

[3] The trial court based its example upon the definition of a general law found in *North Township Advisory Bd. v. Mamla*, 490 N.E.2d 725, 726 (Ind. 1986) in which the Court said: "The fact only one governmental unit presently qualifies under a particular statute and the statute was apparently drafted with that one unit in mind does not render the statute unconstitutional if the terms of the statute would permit other units to eventually qualify. [citations omitted] . . . We find the statute to be of a general nature and not a special law." and *Graves v. City of Muncie*, 264 N.E.2d 607, 610 (Ind. 1970), in which the Court said: "It is entirely possible that other counties will fall within the classification of the statute as the population grows. The voters of those counties may, if they choose, avail themselves of the provisions of the act. There is no mandatory cut-off time as in *Rosencranz*. We, therefore, hold that the act in question in this case is a general and not a special law and as such does not violate Section 22 and Section 23 of Article 4, of the Constitution of Indiana."

The Plaintiff's contend that P.L. 44-1994 violates the federal Equal Protection Clause, the federal Due Process Clause, and Article 1, Section 23, of the Indiana Constitution (the Indiana Equal Protection Clause). The Indiana Supreme Court found that the legislature enacted Public Law 44-1994 to provide a funding mechanism for Tippecanoe County to deal with a unique problem. In finding P.L. 44-1944 [sic] not to be in violation of Article 4, Section 23, the Indiana Supreme Court concluded that there was a rational basis for enacting a special law to address the special circumstances existing in Tippecanoe County. There being a rational basis for Public Law 44-1994, the Plaintiff's equal protection and due process arguments fail.

The Plaintiff also contends that P.L. 44-1944 [sic] violates Article IV, Section 22, of the Indiana Constitution because it is a special law "regulating county or township business." The Indiana Supreme Court concluded that P.L. 44-1994 does not fall within any of the categories enumerated in Article IV, Section 22. Thus, consistent with the opinion of the Indiana Supreme Court, this argument also fails.

Public Law 44-1994 does not create a corporation within the meaning of the provisions of the Indiana Constitution prohibiting the creation of corporations by special acts.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiffs shall take nothing by their

complaint, and that it is hereby dismissed with prejudice, judgment entered for the Defendants on all claims.

/s/ Jeffrey R. Smith
Jeffrey R. Smith, Special Judge

c: Beth H. Henkel, Deputy Attorney General, 402 W. Washington St. Fifth Fl., Indianapolis, IN 46204

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STATE OF INDIANA
COUNTY OF
TIPPECANOE

IN THE TIPPECANOE
CIRCUIT COURT

CAUSE NO.
79C01-9404-CP-125

CHARLES A. HOOVLER, ET AL.

v.

STATE OF INDIANA AND INDIANA
DEPARTMENT OF REVENUE

ORDER

(Filed May 09, 1997)

Plaintiffs' file Motion to Correct Typographical Error.

The Court having considered the Motion finds that paragraph 16 of the Court's Findings of Fact in the order of April 25, 1997, contained a typographical error and should have read as follows:

16. The only evidence before the Court is that the proceeds of the tax will be used to finance the cleanup of the Tippecanoe County Landfill. However, P.L. 44-1994 does not require the use of the tax revenues collected for substance removal or remedial action at the Landfill, nor does it limit the use of the tax revenue collected to substance removal or remedial action at the Landfill.

The court's order of April 25, 1997, is amended, nunc pro tunc, so that paragraph 16 of the findings of fact reads as set forth above.

So ORDERED this 9th day of May, 1997.

/s/ Jeffrey R. Smith
Jeffrey R. Smith, Judge

c: State of Indiana, Herr, RJO

State of Indiana

[LOGO]
217 State House
Indianapolis, IN 46204

H. John Okeson
Clerk of the Supreme Court,
Court of Appeals and Tax Court

(317) 232-1930
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Cause Number

THOMAS HERR
TRUITT & HERR
P.O. BOX 711
LAFAYETTE, IN 47902

79A02-9705-CV-00312
Lower Court Number:
79C019404CP125

Fax Number: 317-429-5591

HOOVLER, CHARLES A., ETAL -V- STATE OF INDIANA

You are hereby notified that the SUPREME COURT has on this day 3/03/98 THIS MATTER COMES BEFORE THE INDIANA SUPREME COURT ON A PETITION TO TRANSFER FROM A DECISION OF THE COURT OF APPEALS, PURSUANT TO INDIANA APPELLATE RULE 11 (B). THE COURT HAS REVIEWED THE DECISION OF THE COURT OF APPEALS, THE RECORD OF PROCEEDINGS, THE BRIEFS WHICH WERE FILED IN THE COURT OF APPEALS, AND THE MATERIALS WHICH WERE SUBMITTED IN CONNECTION WITH THE REQUEST TO TRANSFER JURISDICTION. EACH MEMBER OF THE COURT HAS VOTED ON THE CASE. EACH MEMBER OF THE COURT HAS HAD THE OPPORTUNITY TO VOICE THAT JUSTICES VIEWS ON

THE APPEAL IN CONFERENCE WITH THE OTHER JUSTICES.

BEING DULY ADVISED, THE COURT NOW DENIES THE APPELLANT'S PETITION TO TRANSFER.

RANDALL T. SHEPARD, CHIEF JUSTICE

ALL JUSTICES CONCUR AA

WITNESS my name and the seal of said Court, this 3RD day of MARCH, 1998

/s/ H. John Okeson
Clerk Supreme Court,
Court of Appeals
and Tax Court

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The Indiana Manufacturers Assoc.
Renee R. McDermott
Nashville, Indiana

In The
INDIANA SUPREME COURT

STATE OF INDIANA and INDIANA DEPARTMENT OF REVENUE, Appellants, (Defendants Below), v. CHARLES HOOVLER, PATRICIA ANN PALMER, JEFF SYMMES, LINDA L. OKOS, MARTIN OKOS, and ROBERT M. STWALLEY, III, Individually and as Representatives for and on behalf of all other taxpayers similarly situated, Appellees, (Plaintiffs Below),	79S00-9509-CV-1085

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Jeffrey R. Smith, Special Judge
Cause No. 79C01-9404-CP-125
August 7, 1996

On Direct Appeal

DICKSON, J.

Public Law 44-1994 authorizes Indiana counties having a population of more than 129,000 but less than 130,600 to increase the county economic development income tax rate for certain purposes. According to the 1990 census only one of Indiana's ninety-two counties falls with the statute's population parameters. The trial court found this enactment to be an unconstitutional local or special law in violation of sections 22 and 23 of Article IV of the Indiana Constitution. We reverse.[1]

The following findings by the trial court provide the pertinent facts of this case:

1. On March 2, 1994, the Indiana General Assembly enacted Public Law 44-1994 (HEA 1398), and on March 17, 1994, P.L. 44-1994 was signed into law by Governor Evan Bayh.

2. P.L. 44-1994 authorizes the county income tax council of a county "having a population of more than one hundred twenty-nine thousand (129,000) but less than one hundred thirty-thousand six hundred (130,600)" (P.L. 44-1994, section 6(h)) to impose a county economic development income tax rate which, when added to the county option income tax rate for that county equals "up to one and twenty-five hundredths percent (1.25%)" (P.L. 44-1994, Sec. 6(h)(2)), if the county income tax money is needed in the county to fund substance removal or remedial action,

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[1] The Court acknowledges and appreciates the outstanding memorandum opinion of the trial court and the briefs and oral argument of counsel and amici curiae.

including the repayment of bonds or other debt incurred for substance removal or remedial action, and the actions taken to fund substance removal and remedial action serve a public purpose by promoting public health, welfare, and safety." (P.L. 44-1994, Sec. 10(b)).

3. Based on the 1990 United States census, Tippecanoe County is presently the only county that comes within the population classification established by P.L. 44-1994, section 6(h). Madison County, with an official population of 130,669 and Porter County, with an official population of 128,932, are presently excluded from the classification, as are all other counties in Indiana.

4. P.L. 44-1994 allows the county income tax council of a county that falls within the population classification of 129,000 to 130,600 to impose a higher rate of tax than that which counties outside the population classification may impose pursuant to Ind. Code § 6-3.5-7-5.

5. The Tippecanoe County Sanitary Landfill ("Landfill") is a privately owned landfill in Tippecanoe County, Indiana, and has been placed on the U.S. National Priorities List by the United States Environmental Protection Agency ("U.S. E.P.A."). Potentially Responsible Parties ("PRPs") may be required to pay the cost of the cleanup of the Landfill by the U.S. E.P.A. or may do the necessary cleanup at their expense. Tippecanoe County, the City of Lafayette, the City of West Lafayette, Purdue University,

and a number of private businesses have been designated as PRPs by the U.S. E.P.A.

6. The Tippecanoe County Income Council has made a determination that economic development income tax money is needed in the county to fund substance removal and remedial action, including the repayment of bonds or other debt incurred for substance removal and remedial action pursuant to P.L. 44-1994, Sec. 10(b) and has adopted an ordinance increasing the Tippecanoe County economic income tax by 0.25%, pursuant to P.L. 44-1994, Sec. 6(h)(2).

7. The ordinance of the Tippecanoe County Income Council adopted by the Local Governments provides that the economic income tax money collected pursuant to the rate increase is needed in Tippecanoe County "to fund substance removal and remedial action, including the repayment of bonds or other debt incurred for substance removal and remedial action."

8. Neither P.L. 44-1994 nor the ordinance of the Tippecanoe County Income Tax Council make reference to the Landfill or the purposes for which the funds generated by the tax rate will be expended.

9. The goal of P.L. 44-1994 is to provide a funding mechanism through a county economic development tax to pay for substance removal and remedial action.

10. The Indiana Department of State Revenue is the agency of state government designated to collect the county economic development income tax. It has no other role in the administration of the law.

11. Tippecanoe County is the only county in Indiana where the county and other local governments have been identified by the U.S. E.P.A. as operators of a "superfund" site, the Landfill, and, therefore, are potentially responsible parties for the cleanup of the site.

12. The Landfill does not require removal of toxic industrial wastes but requires the completion of an impermeable cover and a leachate collection system. The problems of the Landfill are those of a typical sanitary landfill that has not been properly closed.

13. The situation regarding the cleanup of the Landfill is unique in that the PRPs are cooperating in the funding of the cleanup.

14. If the U.S. E.P.A. accepts the proposal of the PRPs, the cost of the cleanup may be minimized. If the proposal cannot go forward because the funding mechanism for the cleanup is not in place, the cost of the cleanup may increase.

15. Under the Superfund law, if the potentially responsible parties do not agree on a method of cleanup within 120 days following the issuance of the U.S. E.P.A.'s record of decision, the U.S. E.P.A. will undertake the cleanup and ultimately seek reimbursement for the cleanup from the PRPs.

Record at 751-54.

Based upon its findings of fact, conclusions of law, and explanatory memorandum, the trial court concluded that Public Law 44-1994 "is a local and special law providing for the assessment and collection of taxes for county purposes and therefore violates Article IV, Section 22," and further that the statute "is a special law violating Article IV, Section 23." Record at 760. Because this appeal involves a state statute that has been declared unconstitutional, jurisdiction rests with this Court.[2] Ind. Appellate rule 4(A)(8).

The State contends that the statute is a valid and constitutional exercise of the legislative power to cure a unique local problem and does not fall into any category of prohibited special legislation or, in the alternative, that the statute is general, not special, legislation.

In appellate review of claims tried by a court without a jury, the findings and judgment of the trial court shall not be set aside unless clearly erroneous. Ind. Trial Rule 52(a). However, the final determination of issues of law is a matter for this Court. *See Indiana Indus. v. Wedge Products*, 430 N.E.2d 419, 422 (Ind. Ct. App. 1982). We will presume a statute to be constitutional, and a challenger, against whom all doubts are resolved, must overcome that presumption by clearly demonstrating the provision

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[2] The plaintiffs assert lack of jurisdiction grounds that the State failed to file its praecipe within thirty days after final judgment in a public lawsuit. The State responds that its praecipe was timely filed following the judgment as modified upon the plaintiffs' motion to correct errors. We reject the plaintiffs' claim of jurisdictional defect.

to be invalid. *State v. Rendleman*, 603 N.E.2d 1333, 1334 (Ind. 1992); *Ruge v. Kovach*, 467 N.E.2d 673, 677 (Ind. 1984); *Johnson v. St. Vincent Hosp.*, 273 Ind. 374, 381, 404 N.E.2d 585, 591 (1980).

A local or special statute, as the words imply, is one that – unlike a statute of general applicability – applies not to the entire state but to a particular area, person, class of persons, or set of circumstances exclusively.[3] Because Public Law 44-1994 authorizes a special tax rate to be available to only one Indiana county, it is a local and special law. However, local or special laws are not ipso facto unconstitutional. While the drafters of Indiana's Constitution "expressed a preference for general laws, . . . they also recognized that special laws were sometimes necessary." *Indiana Gaming Comm'n v. Mosely*, 643 N.E.2d 296, 300 (Ind. 1994). The issue before us is whether P.L. 44-1994 is a constitutionally permissible special law.

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[3] We acknowledge that some prior cases imply that a law selectively applicable to special locales or circumstances may be deemed to be general if it employs a population restriction to achieve its limited application. *See State Election Bd. v. Bartolomei*, 434 N.E.2d 74, 76-78 (Ind. 1982). However, the mere presence of a population restriction does not convert an otherwise special law into a general and uniform law. *See North Township Advisory Bd. v. Mamala*, 490 N.E.2d 725, 726-27 (Ind. 1986); *Heckler v. Conter*, 206 Ind. 376, 381, 187 N.E. 878, 879-80 (Ind. 1933); *School City of Rushville v. Hayes*, 162 Ind. 193, 200-01, 70 N.E. 134, 137 (1904). When the legislature seeks to address a special or local problem that cannot be resolved through the use of a general law, the General Assembly may enact a special law plainly designating its intended beneficiary and without employing the subterfuge of population limits, so long as it does not violate the strictures of Article IV, § 22. *See Mosely*, 643 N.E.2d at 298, 301.

Article IV, Section 22

Article IV, Section 22 prohibits local or special laws on subjects falling in any of sixteen categories. The State contends that the trial court erred in finding the statute to be a prohibited local and special law providing for the assessment and collection of taxes for county purposes.[4] Section 22 provides in pertinent part:

> The General assembly shall not pass local or special laws . . . [p]roviding for the assessment and collection of taxes for State, county, township, or road purposes. . . .

Ind. Const. Art. IV, § 22. Resolution of this issue depends upon the meaning given to "assessment and collection."

In interpreting a particular provision of the Indiana Constitution, we seek "the common understanding of both those who framed it and those who ratified it." *Bayh v. Sonneburg*, 573 N.E.2d 398, 412 (Ind. 1991), *cert. denied*, 502 U.S. 1094, 112 S.Ct. 1170, 117 L.Ed.2d 415 (1992). Contemporaneous with the 1851 adoption of our constitution, the relevant definitions of the word "assessment" included: "[a] valuation of property or profits of business, for the purpose of taxation"; "a valuation made by authorized persons according to their discretions, as opposed to a sum certain or determined by law"; "a valuation of the property of those who are to pay the tax, for the purpose of fixing the proportion which each man shall pay, on which valuation the law imposes a specific

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[4] The trial court's finding that the statute violated Article IV, Section 22 did not state that the statute violated that section's prohibition against local or special laws "[r]egulating county and township business," as alleged by the plaintiffs.

sum upon a given amount"; "[a] tax or specific sum charged on persons or property"; and "[t]he act of assessing." Noah Webster, *An American Dictionary of the English Language* 77 (Chauncey A. Goodrich ed. 1856). The same dictionary defines "collection" as "the act of gathering or assembling." *Id.* at 224.

Public Law 44-1994 allows a limited increase in the rate of existing taxes but does not authorize any new property valuations or changes in the system of tax gathering. *See* Ind. Code §§ 6-3.5-7-1 to -22. In light of our duty to construe statutes to be constitutional if reasonably possible, we conclude that, as a matter of law, P.L. 44-1994 does not violate Article IV, Section 22, because it does not provide "for the assessment and collection of taxes."

Article IV, Section 23

The State urges that the trial court erred in finding that P.L. 44-1994 violated Article IV, Section 23 of the Indiana Constitution, which states: "In all the cases enumerated in the preceding Section [Article IV, Section 22], and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State." As discussed above, the challenged statute does not fall within any of the categories enumerated in section 22. Therefore, the remaining issue is whether the subject of P.L. 44-1994 is amendable to a general law of uniform application throughout the state.

A succinct explanation of the trial court's conclusion that P.L. 44-1994 violates Section 23 is found in the following passages included in the written "Rationale of the Court," which accompanied the judgment:

> The goal or purpose of P.L. 44-1994 is to provide a funding mechanism through a county economic development income tax to pay for substance removal and remedial action. The Court does not find the classification in P.L. 44-1994, which excludes all counties having a population greater than 130,600 and less than 129,000, to be based upon substantial distinctions germane to the subject-matter and the object to be obtained.
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> . . .
>
> . . . The provisions of P.L. 44-19[9]4 will only apply to other counties similarly situated, now or in the future, if they, *purely by chance*, fall within the narrow population range. If the legislature intended to address the unique circumstances of Tippecanoe County, . . . then a general law could have been enacted that provided a funding mechanism for substance removal and remedial action by counties having a landfill identified by the U.S. E.P.A. as a "superfund" site in which the county and cities of the county are PRPs. Then, the provisions would have been broad enough to apply to all counties under the same circumstances. It did not do so.

Record at 758-60.

The trial court's rationale is premised upon the idea that legislation authorizing the same optional tax rate modification would be a permissible general statute of uniform operation throughout the state, thus satisfying

Section 23, if it identified eligible counties not by population range but rather by designation as those having an E.P.A. Superfund landfill site for which local governments are Potentially Responsible Parties. We observe that such a statute would selectively apply to only one Indiana county. It would not, in fact, operate uniformly throughout the state. However, we would agree that such a statute would certainly comply with Section 23, not because it is general and uniform but because it is a permissible special statute.

If we limit our consideration to the statute's population language, the trial court is correct in concluding that by using the population range method of identifying eligible counties, the statute has created a special legislative classificatoin that fails to bear a rational relationship to the subject matter in question and the reason for which does not inhere in the statute. However, we find other circumstances surrounding Public Law 44-1994, including language in the Act itself, that – particularly under our deferential standard of review – clearly indicate that the legislature intended the statute to apply exclusively to Tippecanoe County."

First, there is the narrow population range of 1600 persons (between 129,000 and 130,600) which applies only to Tippecanoe County. In the Rationale of the Court explaining its judgment, the trial court acknowledged that the population classification "serves no purpose other than to identify Tippecanoe County." Record at 760. The trial court further notes that Tippecanoe County is the only county in Indiana containing a "Superfund" site for which local governmental entities have been designated Potentially Responsible Parties by the E.P.A.

Record at 754. Public Law 44-1994 applies when the county income tax council, by ordinance, determines:

> that economic development income tax money is needed in the county to fund substance removal and remedial action, including the repayment of bonds or other debt incurred for substance removal or remedial action, and the actions taken to fund substance removal and remedial action serve a public purpose by promoting public health, welfare, and safety.

Ind. Code § 6-3.5-7-22(b). Public Law 44-1994 also authorizes any part of the resulting fund to be distributed to a political subdivision or entity formed by an interlocal cooperation agreement. Ind. Code §§ 6-3.5-7-22(d) to (f). The legislative intent of Public Law 44-1994 was to provide relief from potential Superfund liability. This purpose is demonstrated by the express incorporation into the Act of the definitions of "remedial action" and "removal" found in the Indiana Hazardous Substances Response Trust Fund Act, Ind. Code §§ 13-11-2-185, -187, and the definition of "hazardous substance" found both therein, Ind. Code § 13-11-2-98, and in the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. § 9601. *See* Ind. Code §§ 6-3.5-7-4.6 to 4.8.

The transactional costs and litigation expenses associated with determining the individual liability of Potentially Responsible Parties under the Comprehensive Environmental Response, Compensation, and Liability

Act[5] can be staggering. *See* Sidney S. Liebesman, *Triggering an Obligation: Receipt of an EPA PRP Letter and an Insurer's Duty to Defend*, 5 Vill. Envtl. L.J. 479, 504 n.165. *See generally* United States General Accounting Office, *Superfund – Legal Expenses for Cleanup-Related Activities of Major U.S. Corporations*, 1994 WL 792355 (Dec. 23, 1994) (hereinafter, "GAO Report") (noting, inter alia, that in a survey of several hundred corporations, legal expenses comprised, on the average, one-third of total costs). These costs are in addition to the already burdensome costs of remediating Superfund sites. The record reveals that these costs will, in the present case, be born primarily by public entities, including Purdue University, the cities of Lafayette and West Lafayette, and Tippecanoe County. These transactional and litigation costs can be reduced substantially by entering into a consent decree, but the parties have only a limited time frame within which to enter into such a cost-reducing agreement. *See* Record at 1262-77, 1284-85. In response to these conditions, the legislature enacted Public Law 44-1994 to provide a funding mechanism for Tippecanoe County to deal with this unique problem. Without this revenue-generating system, there would be a lack of resources to enable entry into the consent decree, and the opportunity to reduce the costs associated with the landfill cleanup would be lost. This is a troubling national problem, *see generally* Charrise M. Fraccascia, *Taking Responsibility, Passing the Buck, and Cleaning Up the Mess: Making Municipal Liability Under CERCLA Work*, 44 Case W. Res. L.Rev. 1093 (1995), and no easy, all-encompassing solution exists.

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[5] 42 U.S.C. §§ 9601-9675 (1995).

We find that, in permitting Tippecanoe County to respond in a particular manner to the unique problems it faces under Superfund and related environmental legislation the Indiana General Assembly enacted a special law authorizing Tippecanoe County to enact and administer a special tax rate increase not available to any other county. Mindful of the standard of review under which we uphold the constitutionality of statutes whenever reasonably possible, we conclude that permitting increased taxes due to Tippecanoe County's unique exposure to superfund liability is not a matter necessarily subject to a general law uniformly applicable in all counties. We therefore conclude that P.L. 44-1994 does not, as a matter of law, violate Article IV, Section 23 of the Indiana Constitution.

Urging this Court to exercise strict review of the constitutionality of Public Law 44-1994, the plaintiffs also argue that because its population classification facially excludes other Indiana counties from eligibility, "it is very likely that most of the legislators who voted for it paid no attention to it." Brief of appellees at 18, and that it "may be impossible to repeal . . . because the constituents of the vast majority of the members of the legislature would be unaffected and their representatives would be disinterested." *Id.* at 19. We decline this invitation to intervene in and adjust the legislative process, noting that the Indiana Constitution grants to each house of our General Assembly "all powers necessary for a branch of the legislative department of a free and independent State," Article IV, Section 16, and that it prohibits us from exercising any of the functions of the legislative department, Article III, Section 1.

The trial court judgment finding Public Law 44-1994 to be unconstitutional is reversed, and this cause is remanded for further proceedings consistent with this opinion.

SELBY, J., concurs. SULLIVAN, J., concurs in result with separate opinion in which DeBRULER, J., joins. SHEPARD, C.J., concurs and dissents with separate opinion.

SULLIVAN, J., concurring in result.

I concur in the result of Justice Dickson's opinion. However, I would hold that the population-based categories contained in the statute fulfill the requirements for a valid general law set by a long line of decisions by this court. *See, e.g., North Twp. Advisory Bd. v. Mamala,* 490 N.E.2d 725, 727 (Ind. 1986); *State Election Bd. v. Bartolomei,* 434 N.E.2d 74, 77 (Ind. 1982); *Dortch v. Lugar,* 255 Ind. 545, 552-53, 266 N.E.2d 25, 31-32 (1971); *Graves v. City of Muncie,* 255 Ind. 360, 362, 264 N.E.2d 607, 609 (1970); *Bailey v. Evansville-Vanderburgh Airport Auth. Dist.,* 240 Ind. 401, 408-409, 166 N.E.2d 520, 523-24 (1960); *Bally v. Guilford Twp. Sch. Corp.,* 234 Ind. 273, 279-80, 126 N.E.2d 13, 16-17 (1955); *Groves v. Board of Comm'rs,* 209 Ind. 371, 375-76, 199 N.E. 137, 140 (1936) (citing additional cases). In *Dortch v. Lugar,* we upheld the constitutionality of a statute using population-based categories to create Unigov. What's good for Marion County ought be good for Tippecanoe County as well.

Shepard, Chief Justice, concurring and dissenting.

I agree with Justice Dickson that the statute under challenge is adequately justified as a permissible special statute under Article I [sic], Section 23.

On the other hand, I conclude that the Lafayette amendment to the general county economic development income tax is a "local or special law. . . . [p]roviding for the assessment and collection of taxes for State, county, township, or road purposes. . . . " Accordingly, I would hold it unconstitutional under Article I [sic], Section 22.

STATE OF INDIANA)		IN THE TIPPECANOE
)	SS:	CIRCUIT COURT
COUNTY OF TIPPECANOE)		CAUSE NO.
CHARLES HOOVLER, ET AL.,		79C01-9404-CP-125
PLAINTIFFS		
V.		
STATE OF INDIANA, ET AL.,		
DEFENDANTS		

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This case came before the court for trial on April 27, 1995. Plaintiffs were represented by Thomas Herr and Linda Nearing. Defendants were represented by Pamela Carter, Attorney General of Indiana, by Deputy Attorneys General Beth H. Henkel and Jon Laramore. No party presented additional evidence on April 27, 1995, but the parties stipulated that the testimony received and evidence admitted at the hearing held by this Court on March 1, 1995, would be deemed received and admitted at the trial on the merits of the case. The Court also grants Defendants' motion to admit its Exhibit in three volumes, constituting the draft Remedial Investigation submitted by Tippecanoe County, the City of Lafayette, and the City of West Lafayette ("Local Governments") and other potentially responsible parties to the Environmental Protection Agency regarding the Tippecanoe County Landfill.

Having considered this matter on the merits, and being duly advised, the Court makes the following findings of fact, conclusions of law and judgment:

FINDINGS OF FACT

1. On March 2, 1994, the Indiana General Assembly enacted Public Law 44-1994 (HEA 1398), and on March 17, 1994, P.L. 44-1994 was signed into law by Governor Evan Bayh.

2. P.L. 44-1994 authorizes the county income tax council of a county "having a population of more than one hundred twenty-nine thousand (129,000) but less than one hundred thirty-thousand six hundred (130,600)" (P.L. 44-1994, Section 6(h)) to impose a county economic development income tax rate which, when added to the county option income tax rate for that county equals "up to one and twenty-five hundredths percent (1.25%)" (P.L. 44-1994, Sec. 6(h)(2)), if the county income tax money is needed in the county to fund substance removal or remedial action, including the repayment of bonds or other debt incurred for substance removal or remedial action, and the actions taken to fund substance removal and remedial action serve a public purpose by promoting public health, welfare, and safety." (P.L. 44-1994, Sec. 10(b).

3. Based on the 1990 United States census, Tippecanoe County is presently the only county that comes within the population classification established by P.L. 44-1994, Section 6(h). Madison County, with an official population of 130,669 and Porter County, with an official population of 128,932, are presently excluded from the classification, as are all other counties in Indiana.

4. P.L. 44-1994 allows the county income tax council of a county that falls within the population classification of 129,000 to 130,600 to impose a higher rate of tax than that which counties outside the population

classification may impose pursuant to Ind. Code §6-3.5-7-5.

5. The Tippecanoe County Sanitary Landfill ("Landfill") is a privately owned landfill in Tippecanoe County, Indiana, and has been placed on the U.S. National Priorities List by the United States Environmental Protection Agency ("U.S. E.P.A."). Potentially Responsible Parties ("PRPs") may be required to pay the cost of the cleanup of the Landfill by the U.S. E.P.A. or may do the necessary cleanup at their expense. Tippecanoe County, the City of Lafayette, the City of West Lafayette, Purdue University, and a number of private businesses have been designated as PRPs by the U.S. E.P.A.

6. The Tippecanoe County Income Council has made a determination that economic development income tax money is needed in the county to fund substance removal and remedial action, including the repayment of bonds or other debt incurred for substance removal and remedial action pursuant to P.L. 44-1994, Sec. 10(b) and has adopted an ordinance increasing the Tippecanoe County economic income tax by 0.25%, pursuant to P.L. 44-1994, Sec. 6(h)(2).

7. The ordinance of the Tippecanoe County Income Council adopted by the Local Governments provides that the economic income tax money collected pursuant to the rate increase is needed in Tippecanoe County "to fund substance removal and remedial action, including the repayment of bonds or other debt incurred for substance removal and remedial action."

8. Neither P.L. 44-1994 nor the ordinance of the Tippecanoe County Income Tax Council make reference to the Landfill or the purposes for which the funds generated by the tax rate will be expended.

9. The goal of P.L. 44-1994 is to provide a funding mechanism through a county economic development tax to pay for substance removal and remedial action.

10. The Indiana Department of State Revenue is the agency of state government designated to collect the county economic development income tax. It has no other role in the administration of the law.

11. Tippecanoe County is the only county in Indiana where the county and other local governments have been identified by the U.S. E.P.A. as operators of a "Superfund" site, the Landfill, and, therefore, are potentially responsible parties for the cleanup of the site.

12. The Landfill does not require removal of toxic industrial wastes but requires the completion of an impermeable cover and a leachate collection system. The problems of the Landfill are those of a typical sanitary landfill that has not been properly closed.

13. The situation regarding the cleanup of the Landfill is unique in that the PRPs are cooperating in the funding of the cleanup.

14. If the U.S. E.P.A. accepts the proposal of the PRPs, the cost of the cleanup may be minimized. If the proposal cannot go forward because the funding mechanism for the cleanup is not in place, the cost of the cleanup may increase.

15. Under the Superfund law, if the potentially responsible parties do not agree on a method for cleanup within 120 days following the issuance of the U.S. E.P.A.'s record of decision, the U.S. E.P.A. will undertake the cleanup and ultimately seek reimbursement for the cleanup from the PRPs.

CONCLUSION OF LAW

1. Article IV, Section 22 of the Indiana Constitution provides:

   "The General Assembly shall not pass local or special laws:

   . . . Regulating county and township business;

   . . . Providing for the assessment and collection of taxes for State, county, township, or road purposes; . . . "

2. Article IV, Section 23 of the Indiana Constitution provides:

   "In all the cases enumerated in the preceding Section, and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the State."

3. P.L. 44-1994 is a local and special law providing for the assessment and collection of taxes for county purposes and therefore violates Article IV, Section 22, of the Indiana Constitution.

4. P.L. 44-1994 is a local and special law violating Article IV, Section 23, of the Indiana Constitution.

5. The Court having found P.L. 44-1994 to be an unconstitutional local and special law, Plaintiffs' claims in Counts II and V are moot.

6. Plaintiffs are entitled to an order enjoining the Defendants State of Indiana and Indiana Department of Revenue from collecting any further Tippecanoe County economic development income taxes pursuant to P.L. 44-1994.

7. Plaintiffs are entitled to an order enjoining the Defendants State of Indiana and Indiana Department of Revenue from disbursing any Tippecanoe County

economic development income taxes collected pursuant to P.L. 44-1994.

8. Plaintiff class members are entitled to refunds in amounts equal to the Tippecanoe County economic development income taxes paid pursuant to P.L. 44-1944.

9. Plaintiffs are not entitled to prejudgment interest.

10. The Plaintiff class members constitute all income taxpayers who have been required to pay the increased Tippecanoe County economic development tax imposed pursuant to P.L. 44-1994.

11. This action constitutes a public lawsuit.

12. Plaintiffs are entitled to an award of reasonable attorney fees from the fund recovered for the benefit of the class.

RATIONALE OF THE COURT

In this section, the Court sets forth the rationale for its decision. To the extent that any portion of this section is a finding of fact or conclusion of law material to the Court's determination in this case, it is incorporated into the Findings of Fact and Conclusions of Law.

The Plaintiffs contend that the decision of Local Governments to pay for cleanup of the Landfill is bad policy because the citizens of Tippecanoe County may pay more than their share for the cleanup of the Landfill. The Defendants contend that the Local Governments have acted wisely in moving quickly to finance the cleanup of the Landfill and that prompt action will not only protect the health and safety of the citizens of Tippecanoe County but result in financial savings. The wisdom of the

Local Governments in imposing a tax to cleanup the Landfill is not relevant to the issues before the Court. Such a decision is within the province of the legislative bodies of the Local Governments. The Court will not substitute its wisdom for that of those bodies. The Court addresses only the question of whether P.L. 44-1994 is in violation of Article IV, Section 22 and Section 23 of the Indiana Constitution.

Article IV, Sections 22 and 23 of the Indiana Constitution were enacted at the Constitution Convention of 1850 to stop the growing evil of special and local legislation. These amendments did not stop the enactment of special and local legislation as noted in 1927 by the Indiana Supreme Court, in *Fountain Park Co. v. Hensler* (1927), 199 Ind. 95, 155 N.E. 465, 469:

> "The present legislative tendency toward special and local legislation under the guise and verbiage of general laws should be check, by the Legislature itself, or, by the courts, if it fails to do so; otherwise the body of law will soon revert to the chaotic condition which existed under the old Constitution of 1816."

If P.L. 44-1994 is one of several hundred laws in which a single county is designated through the use of a narrow population range, as claimed by the Defendants, then this tendency continues.

There is little dispute concerning the rules of construction for determining whether a law is special. The rules of construction have been repeated many times by Indiana appellate courts. The difficulty arises in their application. There are many inconsistencies in the appellate court decisions. This trial court is unable to reconcile

decisions such as *North Township Advisory Board v. Mamala* (1986 Ind.) 490 N.E.2d 725, in which a statute requiring the appointment of a professional park superintendent in townships having a population between 180,000 and 204,000 that are located in counties having more than two second-class cities was found valid (only North Township in Lake County fell within the parameters) with decisions such as *School City of Rushville v. Hayes*, 70 N.E. 134 (Ind. 1904) and *Bally v. Guilford School Township School Corporation*, 123 N.E.2d 172 (Ind. 1954) in which classifications by population were found invalid. Therefore, the Court has looked to the following general rules of construction set forth in the decisions rather than the application of the principles in individual cases:

a. It is the duty of the courts to uphold acts of the legislature. A statute is presumptively valid if it can be sustained on any reasonable basis.

b. An act is not special or local if it operates uniformly in all areas where the same circumstances and conditions exist and applies equally to all who come within its provisions.

c. Population alone can be the basis for classification without creating a special or local law.

d. If population alone is the basis for classification, it must bear some rational relationship to the subject dealt with and must be based upon justifiable distinctions when considered in the context of the legislative goal sought to be obtained.

e. The classification must embrace all who possess the attributes or characteristics that are the basis of the classification, and their differences

from those excluded must be substantial and related to the purpose of the legislation.

The goal or purpose of P.L. 44-1994 is to provide a funding mechanism through a county economic development income tax to pay for substance removal and remedial action. The Court does not find the classification in P.L. 44-1994, which excludes all counties having a population greater than 130,600 and less than 129,000, to be based upon substantial distinctions germane to the subject-matter and the object to be obtained.

Classification by the legislature on the basis of population for the purpose of applying methods of governmental organizations is a proper classification. That a city with a very large population may require governmental methods different from a small city is reasonable and natural. However, it is not natural and reasonable to find that a county with a population greater than 130,600 or less than 129,000 does not require the funding mechanism for substance removal and remedial actions provided by P.L. 44-1994 while a county with a population between those figures does. The Court having considered the evidence presented, facts within its judicial knowledge, contemporaneous conditions and situations of people, existing state policies, and matters of common knowledge, finds no suggestion that counties within the narrow population requirement of P.L. 44-1994 have a need unique with respect to all of the other counties in the State of Indiana for the funding of substance removal and remedial actions. There is no reason to conclude that the situation of a county presently excluded would change if its population fell within the parameters of the legislation at the next census or that the situation of a county now

included would be different if it fell outside the parameters at the next census.

P.L. 44-1994 is analogous to the legislation found unconstitutional in *School City of Rushville v. Hayes*, 70 N.E. 134 (Ind. 1904) in which the Indiana Supreme Court stated:

> "Why should the school corporation of a city of not more than 4,545 inhabitants be authorized to issue bonds for the support of its public schools without submitting the question of the expediency of incurring the debt to the electors of the city, while the school corporation of every other city in the state incorporated under the general law is required to decide such question by a popular vote? **In what respect does one corporation differ from all others? It consists solely in a trifling difference in population. The requirements of the statute serve no purpose other than to identify the particular city to which the statute shall apply.** [Emphasis added] The fact that the act is declared to apply to all cities and towns having a population of not more than 4,545 nor less than 4,540, as shown by the last preceding census, does not relieve it from the vice of being a local and special law. The possibility that other cities and towns may hereafter meet the narrow conditions of the statute is not sufficient to take it out of the prohibition of the Constitution. It legal foundation is not more secure than if it had been declared to apply to all cities and towns bearing the name "Rushville," as shown by the last preceding census. The classification is entirely arbitrary and artificial, and the plain command of the Constitution cannot be evaded by so weak

and transparent a device." *School City of Rushville v. Hayes*, 70 N.E. at 137.

The Defendants argue that the legislators were recognizing the uniqueness of Tippecanoe County's situation: the Landfill, the designation of the Landfill by the U.S. E.P.A. as a "Superfund" site, and the inclusion of the City of Lafayette, the City of West Lafayette, and Tippecanoe County as PRPs. Classification by population does not address this unique situation. Classification in legislation is permitted if the provisions are broad enough to apply to all counties and cities under the same circumstances. *Bartholomew County v. Board of Trustees of Town of Edinburg*, 325 N.E.2d 482 (Ind. App. 1975). The provisions of P.L. 44-1944 will only apply to other counties similarly situated, now or in the future, if they, **purely by chance**, fall with the narrow population range. If the legislature intended to address the unique circumstances of Tippecanoe County, as argued by the Defendants, then a general law could have been enacted that provided a funding mechanism for substance removal and remedial action by counties have a landfill identified by the U.S. E.P.A. as a "superfund" site in which the county and cities of the county are PRPs. Then, the provisions would have been broad enough to apply to all counties under the same circumstances. It did not do so.

Clearly the classification contained in P.L. 44-1994 serves no purpose other than to identify Tippecanoe County. The legislature cannot constitutionally pass special legislation that names only Tippecanoe County nor can it do so under the guise of a population classification. This was addressed in *Caesar v. DeVault*, 141 N.E.2d 338 (S. Ct. 1957):

> "The Act of 1945 which limits justices in townships in counties which townships contain two or more cities of the second class, and a city of such class of population from 110,000 to 115,000, is similarly violative of the Indiana Constitution as it is just another attempt to pass legislation for a particular county and is as much in conflict with the Constitution as if it had been specifically declared to apply to all counties bearing the name Lake."

In *School City of Rushville v. Hayes*, 70 N.E. at 137, the court said:

> " . . . If cities and towns may be classified according to trifling differences in population, so may counties and townships. **By means of statutes general in form but local and special in purpose, resting entirely upon slight differences in population, every provision of Article IV, Section 22, of the Constitution may be successfully evaded."** [Emphasis added]

For the above stated reasons, the Court concludes that P.L. 44-1994 is a local and special law providing for the assessment and collection of taxes for county purposes and therefore violates Article IV, Section 22, of the Indiana Constitution. Further, the Court concludes that P.L. 44-1994 is a special law violating Article IV, Section 23, of the Indiana Constitution.

JUDGMENT AND ORDER

Accordingly, the Court now enters judgment as follows:

1. Judgment is entered upon the foregoing findings of fact and conclusions of law.

2. P.L. 44-1994 is declared null and void as an unconstitutional local and special law in violation of Article IV, Sections 22 and 23, of the Indiana Constitution.

3. The Defendants State of Indiana and Indiana Department of Revenue are permanently enjoined from collecting any further Tippecanoe County economic development income taxes pursuant to P.L. 44-1994 effective July 1, 1995.

4. The Defendant State of Indiana and Indiana Department of Revenue are permanently enjoined from disbursing or spending any Tippecanoe County economic development income taxes collected pursuant to P.L. 44-1994.

5. The Defendants State of Indiana and Indiana Department of Revenue are ordered to produce and distribute to counsel for Plaintiffs and all income tax withholding agents in Tippecanoe County within thirty days of this order a revised "Indiana Tax Information Bulletin" showing appropriate income tax withholding rates without any tax adopted pursuant to P.L. 44-1994 to be effective immediately.

6. The Defendants State of Indiana and Indiana Department of Revenue are ordered to file with this Court and to serve upon counsel for Plaintiffs within 90 days from the date of this order a verified accounting of all Tippecanoe County economic development income taxes collected pursuant to P.L. 44-1994 which itemizes on a monthly basis the total amount of tax money collected

pursuant to P.L. 44-1994 for the 1994 tax year and the total amount collected for the 1995 tax year, and which identifies the date and amount of all disbursements of all such funds and persons, agencies, or governmental entities presently having possession or control of all such funds.

7. The amount of the fees and expenses to be allowed to Plaintiffs' attorneys are reserved for future determination following the submission of the Defendant's accounting.

8. Upon completion of the appeal in this case, if Plaintiffs prevail, and after determination of attorney fees chargeable to the fund, notice shall be published in each newspaper of daily or weekly circulation in Tippecanoe County stating that persons who paid the county economic development income tax in Tippecanoe County from July 1, 1994, to present are eligible for refunds and may obtain refunds by making application to the Indiana Department of Revenue. Such applications for refunds must be submitted with 90 days from the publication of notice. The refund applications shall be processed in the regular course of business of the Department of Revenue, with resort to the statutory appeal process if any person is dissatisfied with the action of the Department of Revenue. Any reduction of refunds to provide for payment of attorney fees shall be determined after an accounting has been submitted to the Court and attorney fees determined.

9. When the application processing is completed, the Department of Revenue shall notify the Court how

much money collected under the challenged tax was not distributed.

10. The Indiana Department of Revenue shall be permitted to apply to the Court for payment of the administrative expenses it incurs in administering this remedy, and the Court shall award such reasonable expenses from the unexpended portion of the fund.

11. This judgment is final as to the matters decided herein.

So ORDERED this 9th day of May 1995.

/s/ Jeffrey R. Smith
Jeffrey R. Smith

P.L. 44-1994

HOUSE ENROLLED ACT No. 1398

AN ACT to amend the Indiana Code concerning local government.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. IC 6-3.5-7-1.5 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 1.5. As used in this chapter, "capital project" includes substance removal or remedial action in a designated unit.

SECTION 2. IC 6-3.5-7-4.3 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 4.3. As used in this chapter, "designated unit" refers to a county having a population of more than one hundred twenty-nine thousand (129,000) but less than one hundred thirty thousand six hundred (130,600).

SECTION 3. IC 6-3.5-7-4.6 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 4.6. As used in this chapter, "remedial action" has the meaning set forth in IC 13-7-8.7-1.

SECTION 4. IC 6-3.5-7-4.7 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 4.7. As used in this chapter, "removal" has the meaning set forth in IC 13-7-8.7-1.

SECTION 5. IC 6-3.5-7-4.8 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 4.8. As used in this chapter, "substance" has the meaning set forth in IC 13-7-8.7-1 for "hazardous substance".

SECTION 6. IC 6-3.5-7-5 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 5. (a) Except as provided in subsection (c), the county economic development income tax may be imposed on the adjusted gross income of the county taxpayers. The entity that may impose the tax is:

(1) the county income tax council (as defined in IC 6-3.5-6-1) if the county option income tax is in effect on January 1, of the year the county economic development income tax is imposed;

(2) the county council if the county adjusted gross income tax is in effect on January 1 of the year the county economic development tax is imposed; or

(3) the county income tax council or the county council, whichever acts first, for a county not covered by subdivision (1) or (2).

To impose the county economic development income tax, a county income tax council shall use the procedures set forth in IC 6-3.5-6 concerning the imposition of the county option income tax.

(b) Except as provided in ~~subsection~~ subsections (c) and (h), the county economic development income tax may be imposed at a rate of:

(1) one-tenth percent (0.1%);

(2) two-tenths percent (0.2%);

(3) twenty-five hundredths percent (0.25%);

(4) three-tenths percent (0.3%);

(5) thirty-five hundredths percent (0.35%);

(6) four-tenths percent (0.4%);

(7) forty-five hundredths percent (0.45%); or

(8) five-tenths percent (0.5%);

on the adjusted gross income of county taxpayers.

(c) The county economic development income tax rate plus the county adjusted gross income tax rate, if any, that are in effect on January 1 of a year may not exceed one and twenty-five hundredths percent (1.25%). ~~The~~ Except as provided in subsections(g) through (h), the county economic development tax rate plus the county option income tax rate, if any, that are in effect on January 1 of a year may not exceed one percent (1%).

(d) To impose the county economic development income tax, the appropriate body must, after January 1 but before April 1 of a year, adopt an ordinance. The ordinance must substantially state the following:

"The ___ County ___ imposes the county economic development income tax on the county taxpayers of ___ County. The county economic development income tax is imposed at a rate of ___ percent (___%) on the county taxpayers of the county. This tax takes effect July 1 of this year."

(e) Any ordinance adopted under this section takes effect July 1 of the year the ordinance is adopted.

(f) The auditor of a county shall record all votes taken on ordinances presented for a vote under the

authority of this section and immediately send a certified copy of the results to the department by certified mail.

(g) This subsection applies only to a county having a population of more than one hundred sixty thousand (160,000) but less than two hundred thousand (200,000). Notwithstanding subsection (c), the county economic development income tax rate plus the county option income tax rate that are in effect on January 1 of a year may equal up to one and twenty-five hundredths percent (1.25%) if the county income tax council determines that the combined rate in excess of one percent (1%) is necessary for financing a government building to be subleased to the federal government or an agency or department of the federal government under IC 36-9-13.1. An action to contest the validity of the determination under this subsection must be instituted not more than ten (10) days after the determination.

(h) This subsection applies to a county having a population of more than one hundred twenty-nine thousand (129,000) but less than one hundred thirty thousand six hundred (130,600). In addition to the rates permitted by subsection (b), the:

(1) county economic development income tax may be imposed at a rate of:

(A) fifteen hundredths percent (0.15%);

(B) two-tenths percent (0.2%); or

(C) twenty-five hundredths percent (0.25%); and

(2) county economic development income tax rate plus the county option income tax rate that are in effect on January 1 of a year may equal up

to one and twenty-five hundredths percent (1.25%);

if the county income tax council makes a determination to impose rates under this subsection and section 22 of this chapter.

SECTION 7. IC 6-3.5-7-6 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 6. (a) The body imposing the tax may decrease or increase the county economic development income tax rate imposed upon the county taxpayers as long as the resulting rate does not exceed the rates specified in section 5(b) and 5(c) or 5(h) of this chapter. To decrease or increase the rate, the appropriate body must, after January 1 but before April 1 of a year, adopt an ordinance. The ordinance must substantially state the following:

"The ___ County ___ increases (decreases) the county economic development income tax rate imposed upon the county taxpayers of the county from ___ percent (___%) to ___ percent (___%). This tax rate increase (decrease) takes effect July 1 of this year."

(b) Any ordinance adopted under this section takes effect July 1 of the year the ordinance is adopted.

(c) The auditor of a county shall record all votes taken on ordinances presented for a vote under the authority of this section and immediately send a certified copy of the results to the department by certified mail.

SECTION 8. IC 6-3.5-7-13.1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 13.1. (a) The fiscal officer of each county, city, or town for a county in which the county economic development tax is

imposed shall establish an economic development income tax fund. The revenue received by a county, city, or town under this chapter shall be deposited in the unit's economic development income tax fund.

(b) Except as provided in section 15 of this chapter, revenues from the county economic development income tax may be used as follows:

(1) By a county, city, or town for economic development projects, for paying, notwithstanding any other law, under a written agreement all or a part of the interest owed by a private developer or user on a loan extended by a financial institution or other lender to the developer or user if the proceeds of the loan are or are to be used to finance an economic development project, for the retirement of bonds under section 14 of this chapter for economic development projects, for leases under section 21 of this chapter, or for leases or bonds entered into or issued prior to the date the economic development income tax was imposed if the purpose of the lease or bonds would have qualified as a purpose under this chapter at the time the lease was entered into or the bonds were issued.

(2) By a county, city, or town for:

(A) the construction or acquisition of, or remedial action with respect to, a capital project for which the unit is empowered to issue general obligation bonds or establish a fund under any statute listed in IC 6-1.1-18.5-9.8;

(B) the retirement of bonds issued under any provision of Indiana law for a capital project;

(C) the payment of lease rentals under any statute for a capital project;

(D) contract payments to a not-for-profit corporation whose primary corporate purpose is to assist government in planning and implementing economic development projects; or

(E) operating expenses of a governmental entity that plans or implements economic development projects; or

(F) to the extent not otherwise allowed under this chapter, funding substance removal or remedial action in a designated unit.

(c) As used in this section, an economic development project is any project that:

(1) the county, city, or town determines will:

(A) promote significant opportunities for the gainful employment of its citizens;

(B) attract a major new business enterprise to the unit; or

(C) retain or expand a significant business enterprise within the unit; and

(2) involves an expenditure for:

(A) the acquisition of land;

(B) interests in land;

(C) site improvements;

(D) infrastructure improvements;

(E) buildings;

(F) structures;

(G) rehabilitation, renovation, and enlargement of buildings and structures;

(H) machinery;

(I) equipment;

(J) furnishings;

(K) facilities;

(L) administrative expenses associated with such a project, including contract payments authorized under subsection (b)(2)(D); ~~or~~

(M) operating expenses authorized under subsection (b)(2)(E); or

(N) to the extent not otherwise allowed under this chapter, substance removal or remedial action in a designated unit;

or any combination of these.

SECTION 9. IC 6-3.5-7-17 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1994]: Sec. 17. (a) For purposes of this chapter, an individual shall be treated as a resident of the county in which the individual:

(1) maintains a home if the individual maintains only one (1) home in Indiana;

(2) if subdivision (1) does not apply, is registered to vote;

(3) if subdivision (1) or (2) does not apply, registers the individual's personal automobile; or

(4) if subdivision (1), (2), or (3) does not apply, spends the majority of the individual's time in Indiana during the taxable year in question.

(b) The residence or principal place of business or employment of an individual is to be determined on January 1 of the calendar year in which the individual's taxable year commences. If an individual changes location of residence or principal place of employment or business to another county in Indiana during a calendar year, the individual's liability for county economic development income tax is not affected.

(c) Notwithstanding subsection (b), if an individual becomes a county taxpayer for purposes of IC 36-7-27 during a calendar year because the individual:

(1) changes the location of the individual's residence to a county in which the individual begins employment or business at a qualified economic development tax project (as defined in IC 36-7-27-9); or

(2) changes the location of the individual's principal place of employment or business to a qualified economic development tax project and does not reside in another county in which the county economic development income tax is in effect;

the individual's adjusted gross income attributable to employment or business at the qualified economic development tax project is taxable only by the county containing the qualified economic development tax project.

SECTION 10. IC 6-3.5-7-22 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 22. (a) This section only applies to a designated unit.

(b) The county income tax council may, by ordinance, determine that economic development income tax money is needed in the county to fund substance removal and remedial action, including the repayment of bonds or other debt incurred for substance removal or remedial action, and the actions taken to fund substance removal and remedial action serve a public purpose by promoting public health, welfare, and safety.

(c) If the county income tax council makes a determination under subsection (b), the county income tax council may adopt a tax rate under section 5(h) of this chapter. The tax rate may not be imposed at a rate or for a time greater than is necessary to fund substance removal and remedial action in the county, including the repayment of bonds or other debt incurred for substance removal or remedial action.

(d) The county treasurer shall establish a substance removal and remedial action fund to be used only for the purposes described in this section. County economic development income tax revenues derive from the tax rate imposed under section 5(h) of this chapter shall be deposited in the substance removal and remedial action fund before making a certified distribution under section 12 of this chapter.

(e) The county income tax council may, by ordinance, appropriate or pledge any part of the substance

removal and remediation action fund to a political subdivision or to an entity formed by an interlocal cooperation agreement under IC 36-1-7 for the purposes set forth in this chapter in the county.

(f) The county auditor shall distribute the amount specified in the ordinance to the designated political subdivision or to an entity formed by an interlocal cooperation agreement under IC 36-1-7 from the substance removal and remedial action fund.

(g) Bonds issued by a political subdivision or an entity formed by an interlocal cooperation agreement under IC 36-1-7 payable from the substance removal and remedial action fund do not constitute debt of a designated unit or a city or town in the designated unit, and the bonds shall contain a statement on their face to that effect and to the effect that the bonds are payable solely from money in the substance removal and remedial action fund, and other available funds, and are not supported by the full faith and credit of the county, city, or town.

SECTION 11. IC 36-7-29 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY 1, 1994]:

Chapter 29. Local Environmental Response Financing

Sec. 1. This chapter applies to the following units:

(1) A city having a population of more than five thousand six hundred fifty (5,650) but less than five thousand seven hundred eight (5,708).

(2) A county having a population of more than one hundred twenty-nine thousand five hundred (129,500) but less than one hundred thirty thousand six hundred (130,600).

Sec. 2. As used in this chapter, "board" refers to the local environmental response financing board established by section 10 of this chapter.

Sec. 3. As used in this chapter, "district" refers to the special taxing district established by section 9 of this chapter.

Sec. 4. As used in this chapter, "qualified site" means a site that is wholly or partially located in the district and on July 1, 1994, is:

(1) a site at which solid waste or substances are present or deposited in or on the ground as an intended place of final location; or

(2) an industrial site where a substance is present in or on the ground.

Sec. 5. As used in this chapter, "remedial action" has the meaning set forth in IC 13-7-8.7-1.

Sec. 6. As used in this chapter, "removal" has the meaning set forth in IC 13-7-8.7-1.

Sec. 7. As used in this chapter, "responsible person" has the meaning set forth in IC 13-7-8.7-1.

Sec. 8. As used in this chapter, "substance" has the meaning set forth in IC 13-7-8.7-1 for the term "hazardous substance".

Sec. 9. (a) A special taxing district to be known as the local environmental response taxing district is created

in a city described in section 1(1) of this chapter and in a county described in section 1(2) of this chapter for the purpose of funding substance removal or remedial action for a qualified site. The district shall exist for the public purpose of protecting the health, safety, and welfare of residents in the district by substance removal or remedial action. The general assembly finds that the actions and purposes set forth in this chapter are public purposes.

(b) The district is coterminous with the territory of the unit.

Sec. 10. (a) The district shall be governed by a local environmental response financing board.

(b) If the unit is a city described in section 1(1) of this chapter, the board consists of five (5) members appointed by the city executive.

(c) If the unit is a county described in section 1(2) of this chapter, the board consists of the following six (6) members:

(1) Two (2) members appointed by the county executive.

(2) One (1) member appointed by the county fiscal body.

(3) Two (2) members appointed by the executive of the municipality having the largest population in the district.

(4) One (1) member appointed by the executive of the municipality that has the second largest population in the district.

All board members appointed under this subsection must be local elected officials. A board member appointed

under this subsection who ceases to be a local elected official forfeits membership on the board.

(d) The term of office of a board member is four (4) years. The appointing authority shall fill a vacancy on the board for the unexpired term.

(e) Board members are not entitled to compensation or reimbursement for any services or expenses.

Sec. 11. The board may by its resolutions provide the procedure for its actions, the manner of selection of the board's chairperson, treasurer, secretary, and the other officers or employees of the district, their titles, terms of office, duties, number, and qualifications, and any other lawful subject necessary to the operation of the district and the exercise of the power granted under this chapter. Actions of a legislative nature must be by resolution adopted by a majority of the board. Resolutions proposed may be read by title only unless a reading in full is requested by a member of the board. Actions of an administrative or executive nature may be taken by a majority of the board or by officers of the board or employees of the district as authorized by the board.

Sec. 12. (a) The board may:

(1) receive and disburse funds;

(2) sue and be sued;

(3) plan, finance, and manage substance removal or remedial action at qualified sites;

(4) make and contract for plans, surveys, studies, and investigations necessary for the purpose of substance removal or remedial action at qualified sites;

(5) enter upon property to make surveys, soundings, borings, and examinations;

(6) acquire by negotiation any property or rights or interest in property reasonably required for substance removal or remedial action under the bond resolution without following any other statutory procedures for that acquisition;

(7) accept gifts, grants, or loans of money, other property, or services from any source, public or private, and comply with the terms of the gift, grant, or loan;

(8) borrow in anticipation of taxes;

(9) contract for professional services;

(10) enter into an interlocal cooperation agreement under IC 36-1-7 to obtain funds for:

(A) fiscal;

(B) administrative;

(C) managerial; or

(D) operational;

services from a county or municipality;

(11) conduct or contract for ongoing site maintenance, leachate collection, and long term monitoring at a qualified site after the substance removal or remedial action is complete;

(12) enter into an agreement with a state or federal agency that regulates remedial action or removal;

(13) pursue all legal remedies available as to other responsible persons who are not participating in the financing of the substance removal

or remedial action through payment of property taxes that, in the sole judgment of the board, are commensurate with the responsible person's past use of the qualified site; and

(14) otherwise do all things necessary or proper to accomplish the purposes of this chapter.

(b) This subsection applies to a district located in a county described in section 1(2) of this chapter. In addition to the powers set forth in subsection (a), the board may levy a tax within the district to pay the costs of operation of the district, subject to regular budget and tax levy procedures. However, the maximum amount of taxes levied each year may not exceed fifty thousand dollars ($50,000). The tax described in this subsection shall not be levied after substance removal and remedial action at a qualified site have been completed.

(c) Money recovered by the district from responsible persons shall be used for any of the following:

(1) To redeem bonds issued under section 13 of this chapter.

(2) To pay debt service on bonds issued under section 13 of this chapter.

(3) To reimburse a unit in the district for costs associated with removal or remediation at the qualified site prior to the issuance of bonds issued under section 13 of this chapter.

(4) To pay ongoing costs of the district associated with remediation or removal.

Sec. 13. (a) Subject to section 15 of this chapter, the board may issue district bonds under this section for the

payment of the cost of substance removal or remedial action at a qualified site.

(b) On adopting a resolution ordering the issuance of district bonds, the board shall certify a copy of the resolution and a copy of the approval to the treasurer of the district, who shall prepare the district bonds.

(c) The district bonds are special obligations of indebtedness of the district. The district bonds issued under this section, and interest on the district bonds, are payable solely out of a special tax levied on all of the property of the district or other funds that may, under this chapter, or under any other law, be used to pay debt service on bonds. The district bonds must recite the terms on the face of the district bonds together with the purpose for which the district bonds are issued. For the purpose of raising money to pay district bonds issued under this section, the board shall levy each year a special tax on all of the property in the district in the amount and the manner necessary to meet and pay the principal of the district bonds as they severally mature, together with all accruing interest on them. The tax is declared to constitute the amount of benefits resulting to all of the property of the district.

(d) All proceeds from the sale of the district bonds shall be kept as a separate and specific fund, to pay the cost of substance removal or remedial action, and no part of the proceeds may be used for any other purpose, except as provided in IC 5-1-13 and IC 5-1-14.

(e) The tax levied each year shall be certified to the treasurer of the district and to the county auditor. The tax levied and certified shall be estimated and entered upon

the tax duplicate by the county auditor and shall be collected and enforced. As the tax is collected by the county treasurer, the tax shall be transferred to the treasurer of the district, kept in a separate fund to be known as the district bond fund, and applied to the payment of the principal of and interest on the district bonds as the district bonds become due and to no other purpose, except as provided in IC 5-1-13 and IC 5-1-14.

(f) The special tax described in this section may not be levied after the last of the principal and interest on bonds issued under this chapter have been completely paid.

Sec. 14. (a) All district bonds issued under this chapter may:

(1) be issued as serial or term bonds or as a combination of both;

(2) be executed and delivered by the district at any time and from time to time;

(3) bear the date or dates;

(4) bear the maximum interest rates, if fixed rates are used, or specify any manner in which the interest rate will be determined, if variable or adjustable rates are used;

(5) be redeemable before their stated maturities on the terms and conditions and at premiums as determined by the board;

(6) be issued in any denomination of not less than five thousand dollars ($5,000);

(7) be in a form, either book entry or registered, or both;

(8) carry registration conversion privileges;

(9) be payable in a medium of payment and at a place or places, which may be at any one (1) or more banks or trust companies within or outside Indiana;

(10) provide for the replacement of mutilated, destroyed, stolen, or lost bonds;

(11) be authenticated in a manner and upon compliance with conditions;

(12) establish reserves from the proceeds of the sale of bonds or from other funds, or both, to secure the payment of the principal and interest on the district bonds issued under this chapter; and

(13) contain other terms and covenants;

as provided in the resolution of the board authorizing the district bonds.

(b) The district bonds issued under this chapter may mature at the time or times not to exceed forty (40) years.

(c) The district bonds issued under this chapter may bear either the impressed or facsimile seal of the district and shall be executed by the manual or facsimile signature of the chairperson of the board and attested by the manual or facsimile signature of the treasurer of the district, if one (1) of these signatures is manual. However, any signatures may be facsimiles if the bonds are to be manually authenticated by a fiduciary.

(d) The district bonds and the interest coupons appertaining to them, if any, issued under this chapter are

valid and binding obligations of the district for all purposes in accordance with the terms of this chapter, notwithstanding that before delivery of the district bonds and any appertaining interest coupons, any of the persons whose signatures appear on the district bonds and any appertaining interest coupons have ceased to be officers of the district, as if the persons had continued to be officers of the district until after delivery.

(e) The district bonds issued under this chapter may be sold at public or private sale for the price or prices that may be provided in the resolution authorizing their issuance.

Sec. 15. (a) Except as provided in subsection (b) or (c), the amount of the district bonds issued under this chapter may not exceed the total amount that the board determines is reasonably necessary to be incurred in connection with the substance removal or remedial action. The board shall base a determination under this subsection on the best estimates available before the district bonds are issued.

(b) This subsection applies to a district located in a city described in section 1(1) of this chapter. Notwithstanding any other law, the total amount of the district bonds issued under this chapter, including district bonds already issued and outstanding under this chapter, may not exceed four percent (4%) of the total assessed valuation of the district after deducting all mortgage exemptions in the district.

(c) This subsection applies to a district located in a county described in section 1(2) of this chapter. Notwithstanding any other law, the total amount of the district

bonds issued under this chapter, including district bonds already issued and outstanding under this chapter, may not exceed two percent (2%) of the total assessed valuation of the district after deducting all mortgage exemptions in the district.

Sec. 16. (a) District bonds may be issued by a board under this chapter without following any procedures set forth in any other statute except that the board must:

(1) adopt a bond resolution after a public hearing following public notice of the hearing published in accordance with IC 5-3-1;

(2) publish notice of the determination to issue district bonds in accordance with IC 6-1.1-20-5;

(3) obtain the approval for the appropriation of the proceeds of the district bonds as set forth in IC 6-1.1-18-5 if the appropriation is an additional appropriation; and

(4) obtain the approval of the state board of tax commissioners for a tax levy under IC 6-1.1-18.5-8.

(b) The bond resolution must contain a finding that substance removal or remedial action at the qualified site will be of public utility and benefit because the conditions at the qualified site are detrimental to the social and economic interests of the district.

Sec. 17. (a) A district:

(1) pending receipt of any grant; or

(2) in anticipation of the issuance of district bonds under this chapter;

may borrow money from any person and evidence the debt by a note or notes executed by the chairperson of the board and the treasurer of the district. The note or notes must contain the terms and provisions prescribed by the board.

(b) An issuance of a note or notes or evidence of indebtedness under this section may be sold at a public or private negotiated sale.

(c) A note or notes issued or renewed under this section must mature not more than five (5) years from the date of issuance of the original note and must pledge for the payment of the principal and interest the proceeds of the grant of district bonds.

(d) The board shall apply the proceeds of any note or notes issued under this section to the cost of the substance removal or remedial action for which the grant is to be made or bonds issued, but no purchaser of any obligations is liable for the proper application of the proceeds.

(e) Notes issued under this section must be approved by a resolution of the board.

Sec. 18. A district bond or note issued in connection with a financing under this chapter is exempt from the registration requirements of IC 23.

Sec. 19. All district bonds, as well as bond anticipation notes, issued under this chapter and the interest on them are exempt from taxation in accordance with IC 6-8-5.

Sec. 20. An action to contest the validity of the district bonds or to prevent their issuance must be brought within thirty (30) days following the publication of the public notice under section 16(a)(1) of this chapter.

Sec. 21. This chapter constitutes full authority for the issuance of district bonds. No procedure, proceedings, publications, notices, consents, approvals, orders, acts, or things by a board, an officer, a commission, a department, an agency, or an instrumentality of the state is required to issue district bonds or to do any act or perform anything under this chapter, except as may be prescribed in this chapter. The powers conferred by this chapter are in addition to, and not in substitution for, and the limitations imposed by this chapter do not affect the powers conferred by any other statute.

Sec. 22. The general assembly covenants and agrees with the holders of any district bonds that as long as any district bonds issued under this chapter are outstanding and unpaid, that state:

(1) will not limit or alter the rights of the district to fulfill their terms of any agreements made with the holders of the district bonds; and

(2) will not in any way impair the rights and remedies of the holders of the district bonds;

until the district bonds, together with interest on the district bonds, interest on any unpaid installment of interest, and all costs and expenses in connection with any action or proceedings by or on behalf of the bondholders are fully paid, met and discharged.

Sec. 23. This chapter is supplemental to all other statues covering the funding of substance removal or remedial action.

SECTION 12. An emergency is declared for this act.

Excerpts from April 15, 1994
Complaint of Charles A. Hoovler et al.
Tippecanoe Circuit Court Cause No. 79C01-9404-CP-125

* * *

COUNT II
FEDERAL SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION

For Count II of their complaint, plaintiffs state:

1. Plaintiffs hereby incorporate the allegations of Count I, paragraphs 1-8.

2. On March 2, 1994 the Indiana General Assembly enacted House Enrolled Act No. 1398, and on March 17, 1994, HEA 1398 was signed into law by Governor Evan Bayh. A copy of HEA 1398 is attached as Exhibit A.

3. HEA 1398 authorizes the county income tax council of a county "having a population of more than one hundred twenty-nine thousand (129,000) but less than one hundred thirty thousand six hundred (130,600)" (HEA 1398, Section 6(h)) to impose a county economic development income tax rate which, when added to the county option income tax rate for that county, equals "up to one and twenty-five hundredths percent (1.25%)" (HEA 1398, Sec. 6(h)(2)), if the county income tax council makes a determination "that economic development income tax money is needed in the county to fund substance removal and remedial action, including the repayment of bonds or other debt incurred for substance removal or remedial action, and the actions taken to fund substance removal and remedial action serve a public purpose by promoting public health, welfare, and safety." (HEA 1398, Sec. 10(b)).

4. The above-named individual Plaintiffs and the class they seek to represent are required to pay the economic development income tax and the county option income tax imposed in Tippecanoe County.

5. Tippecanoe County has a population of 130,598, per Executive Order 91-5, issued on March 26, 1991. Executive Order 91-5 establishes the official population of political subdivisions pursuant to Ind. Code § 1-1-3.5-3.

6. Tippecanoe County is presently the only county which comes within the population classification established by HEA 1398, Section 6(h). Madison County, with an official population of 130,669, and Porter County, with an official population of 128,932, are presently excluded from the classification, as are all other counties in Indiana.

7. HEA 1398 allows the county income tax council of a county which falls within the population classification of 129,000 to 130,600 to impose a higher rate of tax than that which counties outside the population classification may impose pursuant to Ind. Code § 6-3.5-7-5(c).

8. The Tippecanoe County Income Tax Council has made a determination pursuant to HEA 1398 Sec. 6(h)(2) and has adopted an ordinance increasing the Tippecanoe County economic development income tax by 0.25%, pursuant to HEA 1398. The tax increase will take effect July 1, 1994.

9. Plaintiffs and the class they seek to represent are subject to the increased county economic development income tax authorized by HEA 1398 and adopted by the Tippecanoe County Income Tax Council.

10. Beginning July 1, 1994, HEA 1398 and the collection of increased county economic development income taxes pursuant to that Act will result in an arbitrary, capricious, and irrational taxation and deprivation of property of Plaintiffs and the class without due process of law in violation of the substantive due process requirements of the Fourteenth Amendment to the United States Constitution.

11. HEA 1398 also violates the equal protection clause of the Fourteenth Amendment of the U.S. Constitution because it intentionally discriminates against taxpayers in counties having populations between 129,000 and 130,600, which presently includes only Tippecanoe County. HEA 1398 arbitrarily, capriciously, and without legitimate governmental purpose creates a class of taxpayers within the State who are subject to a higher rate of county income tax. There is no rational basis for this classification. There is no legitimate governmental purpose which justifies the authorization of the above-described tax increase only on counties having a population between 129,000 and 130,600.

12. Plaintiffs and the class will be deprived of their property and will suffer irreparable harm if the Defendants are permitted to collect the above-described unconstitutional tax increase, and Plaintiffs and the class have no adequate remedy at law.

WHEREFORE, Plaintiffs respectfully request:

1. A declaratory judgment that HEA 1398 is invalid and violates the Fourteenth Amendment to the United States Constitution.

2. An injunction prohibiting the Defendants State of Indiana and Indiana Department of Revenue from collecting any increased Tippecanoe County economic development income taxes pursuant to HEA 1398.

3. An injunction prohibiting the Defendants State of Indiana and Indiana Department of Revenue from disbursing or spending any increased Tippecanoe County economic development income taxes collected pursuant to HEA 1398.

4. An order requiring the Defendants State of Indiana and Indiana Department of Revenue to provide an accounting of any and all increased Tippecanoe County economic development income taxes collected pursuant to HEA 1398.

5. An order requiring a refund to the Plaintiff class of all increased Tippecanoe County economic development income taxes collected pursuant to HEA 1398.

6. A judgment for any and all damages suffered by the Plaintiff class as a result of the unconstitutional actions of Defendants State of Indiana and Indiana Department of Revenue.

7. Reasonable attorney's fees and litigation expenses pursuant to T.R. 23(D).

8. Prejudgment interest.

9. The costs of this action.

10. All other proper relief.

* * *

Excerpts from May 28, 1997
Brief of Appellants Charles A. Hoovler et al.
Indiana Court of Appeals Cause No. 79A02-9705-CV-312

I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. Whether the trial court erred in concluding that P.L. 44-1994 does not violate Article 4, Section 19 of the Indiana Constitution which requires that acts be limited to one subject.

B. Whether the trial court erred in concluding that P.L. 44-1994 does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

C. Whether the trial court erred in concluding that P.L. 44-1994 does not violate Article 1, Section 23 of the Indiana Constitution regarding equal privileges and immunities.

D. Whether the trial court erred in concluding that P.L. 44-1994 does not violate Article 4, Section 22 of the Indiana Constitution which prohibits special and local laws regulating county business.

E. Whether the trial court erred in concluding the P.L. 44-1994 does not violate Article 11, Section 13 of the Indiana Constitution which prohibits special laws forming corporations.

* * *

B. Public Law 44-1994 Violates The Equal Protection Clause Of The Fourteenth Amendment To The United States Constitution

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Where a State makes a classification, the Equal Protection Clause requires that the classification rationally further a legitimate state interest. *Nordlinger v. Hahn*, 505 U.S. 1, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992). The Equal Protection Clause also requires that a classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the differences in classification, as to be wholly arbitrary. *Walters v. St. Louis*, 347 U.S. 231, 74 S.Ct. 505, 98 L.Ed. 660 (1954).

In a number of fairly recent cases the United States Supreme Court has struck down tax related classifications as contrary to the Equal Protection Clause. *See Allegheny Pittsburgh Coal Co. v. Webster County*, 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989) (disparate assessment of recently sold real estate); *Hoover v. Bernalillo County Assessor*, 472 U.S. 612, 105 S.Ct. 2862, 86 L.Ed.2d 487 (1985) (exemption only for veterans who were residents prior to certain date); *Williams v. Vermont*, 472 U.S. 14, 105 S.Ct. 2465, 86 L.Ed.2d 11 (1985) (auto sales tax credit); *Metropolitan Life v. Ward*, 470 U.S. 869, 105 S.Ct. 1676, 84 L.Ed.2d 751 (1985) (out-of-state insurance companies taxed at higher rate). These cases demonstrate that a State's power to classify is not unlimited.

Public Law 44-1994 is filled with classifications. Section 2 adds Ind. Code § 6-3.5-7-4.3 which defines a "designated unit" as a county having a population of more than 129,000, but less than 130,600. Section 7 amends Ind. Code § 6-3.5-7-5 to allow for a higher economic development income tax rate in a county having a population of more than 129,000 but less than 130,600. Section 8 amends Ind. Code § 6-3.5-7-13.1 to allow for the use of economic development income tax revenues by a county, city or town for funding substance removal or remedial action only in a "designated unit", which is defined as one having a population of more than 129,000, but less than 130,600. Section 8 also amends Ind. Code § 6-3.5-7-13.1 to provide that an economic development project includes an expenditure for substance removal or remedial action only in a "designated unit" meeting the specified population limit. Section 10 of P.L. 44-1994 adds Ind. Code § 6-3.5-7-22 which pertains to EDIT taxes raised for substance removal and remedial action and applies only to a "designated unit", which is one meeting the specified population limit.

Section 11 of P.L. 44-1994 adds Ind. Code § 36-7-29 which creates a Local Environmental Response Financing Boards in a city having a population of more than 5,650, but less than 5,708 and in a county having a population of more than 129,500, but less than 130,600. Also, Section 11 of P.L. 44-1994 creates Ind. Code § 36-7-29-15(c) which applies only to a district located in a county described in Ind. Code § 36-7-29-1 (which is a county having a population of more than 129,500, but less than 130,600). Section 11 also defines a qualified site as one existing as of July 1, 1994.

The trial court found that the goal of P.L. 44-1994 is to provide a funding mechanism through a county economic development income tax to pay for substance removal and remedial action. (R. 121, para. 9) All of the above classifications are arbitrary and bear no rational relationship to the purpose of funding substance removal and remedial action. There is no rational basis for a classification which requires taxpayers to be assessed additional taxes for substance removal and remedial action only in a county and city falling within the population limits of the act and having a qualified site existing as of July 1, 1994.

In denying Hoovler's Equal Protection claim, the trial court erred in failing to follow the law of the case as established by the Indiana Supreme Court. On Page 8 of its May 9, 1995 judgment, the trial court stated:

> The Court does not find the classification in P.L. 44-1994, which excludes all counties having a population of greater than 130,600 and less than 129,000, to be based upon substantial distinctions germane to the subject-matter and the object to be obtained. (R. 26)

The Supreme Court in *Hoovler* did not find any error in this conclusion. Instead, Justice Dickson, with Justice Selby, concurring said:

> If we limit our consideration to the statute's population language, the trial court is correct in concluding that by using the population range method of identifying eligible counties, the statute has created a special legislative classification that fails to bear a rational relationship to the subject matter in question and the reason does not inhere in the statute. (R. 43-44, 668 N.E.2d at 1234)

Justice Shepard also concurred that P.L. 44-1994 is a local or special law. (R. 51; 668 N.E.2d at 1236) A population classification must bear some rational relationship to the subject dealt with and must be based on justifiable distinctions when considered in the context of the legislative goal sought to be obtained. Otherwise, the act is a special or local law. *Dortch v. Lugar*, 255 Ind. 545, 552-53, 266 N.E.2d 25, 31 (1971). If there was any conceivable rational basis for the population classification, Justices Dickson, Selby and Shepard could not have concluded that 44-1994 is a special and local law. Therefore, it is now the law of this case that the population classifications in P.L. 44-1994 are *not* rationally related to the purpose of providing funding for substance removal and remedial action. *See Cha v. Warnick*, 476 N.E.2d 109, 114 (Ind. 1985) (under the law of the case doctrine an appellate court determination of a legal issue is binding on the trial court). Since the classifications are not rationally related to the act's purpose, the act fails to meet the United States Supreme Court's "rational basis" test under the Equal Protection Clause as a matter of law.

Even if it were not the law of the case, it is still evident from the plain language of P.L. 44-1994 that the arbitrary population classifications and time limitations in P.L. 44-1994 fail to meet the rational basis test. It is evident on the face of P.L. 44-1994 that the classifications and time limits bear no rational relationship to any legitimate state interest. They are arbitrary and irrational and their sole purpose is to attempt to evade the constitutional limitations on the legislature. Hoovler is aware of no authority holding that a legislative body has a legitimate interest in evading the constitutional limitations on

its own power. *See Palcek v. City of Chicago Heights*, 393 N.E.2d 1218 (Ill. App. 1979) (arbitrary population classifications would violate Equal Protection Clause); *Peddycoart v. City of Birmingham*, 354 So.2d 808 (Ala. 1978) (arbitrary population classification violated Equal Protection Clause); *Barber College, Inc. v. Mincey*, 193 So.2d 610 (Fla. 1967) (arbitrary population limit violated Equal Protection Clause). Also, in discussing Hoovler's Equal Protection claim, the trial court misconstrued the legal effect of the Supreme Court's divided opinion when the trial court said:

> The Indiana Supreme Court found that the legislature enacted Public Law 44-1994 to provide a funding mechanism for Tippecanoe County to deal with a unique problem. In finding P.L. 44-1994 not to be in violation of Article 4, Section 23, the Indiana Supreme Court concluded that there was a rational basis for enacting a special law to address the special circumstances existing in Tippecanoe County. (R. 124)

These conclusions by the trial court are wrong. The Supreme Court made no such findings or conclusions. The Supreme Court disposed of this case through three separate opinions. No majority of the Supreme Court concurred in any of the three separate opinions. The only points of law upon which any three members of the Supreme Court agreed were:

> 1. Public Law 44-1994 is a special and local law (Justices Dickson, Selby and Shepard); and

> 2. It could be reasonably concluded that P.L. 44-1994 could not be made applicable statewide and it therefore did not violate Article 4,

Section 23. (Justices Dickson, Selby and Shepard).

There are no other points of law expressed in *Hoovler* upon which three or more Justices concurred. If fewer than the majority concur in an opinion, there is no ruling opinion except as to the disposition of the case. 21 C.J.S. *Courts* § 141(b). If a majority of the Court agrees on a decision in a case, but less than a majority agree on the reasoning for that decision, the decision has no *stare decisis* effect. 20 Am. Jur. 2d *Courts* § 159.

Therefore, the "Supreme Court" did not find that the legislature enacted P.L. 44-1994 to provide a funding mechanism for Tippecanoe County to deal with a unique problem. And, the "Supreme Court" did not conclude that there was a rational basis for enacting a special law to address the special circumstances existing in Tippecanoe County. No majority expressed these conclusions.

Also, there is nothing in Justice Dickson's opinion, or elsewhere in the Supreme Court's opinions, that indicates there is any rational basis for the population classifications or time limit in P.L. 44-1994, or any rational basis for limiting the act to Tippecanoe County and a city having a population between 5,650 and 5,708. No member of the Supreme Court indicated that P.L. 44-1994 and its classifications were reasonable or rational. At most, Justice Dickson, with Justice Selby concurring, concluded that P.L. 44-1994 was intended "to apply exclusively to Tippecanoe County." (R. 44)

Finally, even if the trial court's interpretation of the Supreme Court's opinions were correct, it is not now the

law of this case because the trial court made additional findings of fact. When additional facts distinguish a case from the case decided in the first appeal, the law of the case doctrine has no application. *Estate of Martin v. Consolidated Rail Corp.*, 667 N.E.2d 219 (Ind. App. 1996). The trial court stated in paragraph 16 of its new findings of fact that:

> 16. The only evidence before the Court is that the proceeds of the tax will be used to finance the cleanup of the Tippecanoe County Sanitary Landfill. However, P.L. 44-1994 does not require the use of the tax revenues collected for substance removal or remedial action at the Landfill, nor does it limit the use of the tax revenues collected to substance removal or remedial action at the Landfill. (R. 122, amended *nunc pro tunc* on May 9, 1997, R. 129)

Thus, the tax revenues raised under P.L. 44-1994 can be used solely at sites other than the Landfill. Given this new fact that was not before the Supreme Court, it is evident that P.L. 44-1994 was not intended for the Landfill and it is even clearer that there is no conceivable rational basis for the numerous classifications in P.L. 44-1994.

It also is important to note that the State does not contend that no other local government in Indiana is a potentially responsible party for a Superfund site. (R. 101)

For these reasons, the Court has no alternative but to declare that P.L. 44-1994 is invalid as contrary to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and reverse the judgment of the trial court.

* * *

Excerpts from June 26, 1997
Reply Brief of Appellants Charles A. Hoovler, et al.
Indiana Court of Appeals Cause No. 79A02-9705-CV-312

* * *

C. Public Law 44-1994 Violates the Equal Protection Clause

In discussing Hoovler's contention that P.L. 44-1994 violates the Equal Protection Clause, the State fails to address the core issue raised by this appeal. The critical question is whether the General Assembly can use arbitrary population and time limits in regulating local government. The State repeatedly argues that the P.L. 44-1994 is rational, but never argues that the population and time classifications in the Act are rational. By not addressing this key issue, the State apparently, and with good reason, concedes that the population and time limits are arbitrary and not rationally related to the purposes of the Act. However, the larger questions remain. Can a State use arbitrary classifications to regulate local government? Under the Equal Protection Clause, is the General Assembly free to use arbitrary population and time limits to classify local governments? Is there any limit on the State's power to carve out small pieces of the State and subject it to disparate treatment? This is the most significant question raised by this appeal and is the one that will have the most widespread effect on future acts of the General Assembly.

The State apparently contends that it should have the power to use arbitrary population and time limitations to classify local governments because the ends justifies the means. The whole thrust of the State's argument is that

the General Assembly could have determined that P.L. 44-1994 is a good law and that it is therefore constitutional. However, in the field of constitutional law the end does not justify the means. *Allen v. Van Buren Township of Madison County*, 243 Ind. 665, 184 N.E.2d 25, 31 (1962).

Instead, the process by which those who exercise governmental power achieve their ends must meet certain minimal standards, regardless of the ends attained. This is how we assure that the ends attained truly are good. This is why we have Article 4, Sections, 19, 22 and 23, Article 1, Section 23, and Article 11, Section 13 of the Indiana Constitution. This is why we have Due Process requirements. The process by which governmental power is exercised is as important as the goals achieved.

Reference to the process by which laws are made also is relevant to Equal Protection analysis. In *Railway Express Agency v. New York*, 336 U.S. 106, 112, 69 S.Ct. 463, 93 L.Ed 533, 540 (1949) Justice Jackson expressed this classic formulation:

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws

> will be just than to require that laws will be equal in operation. 336 U.S. at 112.

Hoovler does not address whether the ends achieved by P.L. 44-1994 are good or evil, though he can easily show its harm in allowing certain influential industrial corporations to shift their responsibility for environmental damage to individual income taxpayers. Instead, Hoovler contends that the process by which the State's ends are achieved is defective.

A hypothetical scenario helps illustrate the offensiveness of P.L. 44-1994. Assume that the United States Congress through the exercise of its Commerce Clause powers enacted a law declaring that no state could impose a motor fuel tax more than a $0.25 per gallon. Later, Congress issues a new law declaring that a state having an official population of not less than 5,540,000 and not more than 5,550,000 (which includes only Indiana) may impose an additional $.05 per gallon tax to fund substance removal and remedial action. Could Congress realistically claim that its actions comply with Equal Protection requirements? Could Congress justify its classification by showing that Indiana is unique because it has more hazardous waste sites than any other state?

The absurdity and constitutional infirmity of any such action by Congress is apparent. The actions of the General Assembly in employing arbitrary classifications in P.L. 44-1994 are equally absurd, offensive and constitutionally defective. If it is upheld, the General Assembly will conclude that there are no Equal Protection limits on its power so long as it indulges in the subterfuge of

arbitrary population limits, which are limited only by one's imagination.

Also, it is irrelevant whether the tax rate imposed in Tippecanoe County is unique. The State fails to show any authority for the proposition that an arbitrary classification is constitutional so long as at least twenty-one other counties have the same tax rate. Uniqueness is not an element of Equal protection analysis. The State also ignores the fact that only in Tippecanoe County may local government require citizens to pay additional EDIT taxes to fund substance removal and remedial action. This is the only relevant sense in which Tippecanoe County is really unique.

In evaluating Hoovler's claim that P.L. 44-1994 violates the Equal Protection Clause, the question that the Court of Appeals must answer is not whether P.L. 44-1994 is a good or bad law. Instead, the Court must determine whether the 14th Amendment's Equal Protection Clause prohibits the State of Indiana from using patently arbitrary classifications. Hoovler has shown that such classifications are prohibited and that the Act is invalid. *See* Brief of Appellants, pp. 16-22.

* * *

IN THE SUPREME COURT OF INDIANA

CAUSE NO. ___

CHARLES A. HOOVLER, LINDA L. OKOS, MARTIN OKOS, PATRICIA ANN PALMER, ROBERT M. STWALLEY, III, and JEFF SYMMES, INDIVIDUALLY AND AS REPRESENTATIVES FOR AND ON BEHALF OF ALL OTHER TAXPAYERS SIMILARLY SITUATED, Appellants/Plaintiffs below, vs. STATE OF INDIANA and INDIANA DEPARTMENT OF REVENUE, Appellees/Defendants below.	APPEAL FROM THE TIPPECANOE CIRCUIT COURT CAUSE NO. 79C01-9404-CP-125 THE HONORABLE JEFFREY R. SMITH, SPECIAL JUDGE COURT OF APPEALS CAUSE NO. 79A02-9705-CV-312

PETITION FOR TRANSFER PURSUANT TO IND. APPELLATE RULE 11

(Filed Dec. 24, 1997)

Appellants/Plaintiffs below Charles A. Hoovler, Linda L. Okos, Martin Okos, Patricia Ann Palmer, Robert M. Stwalley III and Jeff Symmes, individually and as

representatives for and on behalf of all other taxpayers similarly situated, by counsel Thomas J. Herr, hereby petition the Supreme Court of Indiana for transfer pursuant to Ind. Appellate Rule 11 for the purpose of correcting errors in the opinion of the Indiana Court of Appeals dated December 17, 1997. In support of this Petition For Transfer, Appellants show the Court the following:

1. The Indiana Court of Appeals decided this case with a written opinion filed December 17, 1997.

2. The opinion of the Indiana Court of Appeals was against the Appellants.

3. No petition for rehearing was filed with the Indiana Court of Appeals.

4. The December 17, 1997 opinion of the Indiana Court of Appeals is in error in the following respects:

A. The opinion of the Court of Appeals contravenes the following ruling precedents of the Indiana Supreme Court:

(1) *State v. Hoovler*, 668 N.E.2d 1229 (Ind. 1996)

(2) *Collins v. Day*, 664 N.E.2d 72 (Ind. 1994)

(3) *Rosencranz v. City of Evansville*, 194 Ind. 499, 143 N.E.2d 593 (1924)

(4) *Joint County Park Board v. Stegemoller*, 228 Ind. 103, 88 N.E.2d 686 (1949)

B. The Court of Appeals erroneously ruled that P.L. 44-1994 does not violate Article IV, Section 19 of the Indiana Constitution which requires that legislative acts be confined to one subject.

C. The Court of Appeals erroneously ruled that P.L. 44-1994 does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

D. The Court of Appeals erroneously ruled that P.L. 44-1994 does not violate Article I, Section 23 of the Indiana Constitution (Equal Privileges and Immunities).

E. The Court of Appeals erroneously ruled that the Indiana Supreme Court previously determined as a matter of the law of the case that P.L. 44-1994 does not violate Article IV, Section 22 of the Indiana Constitution which prohibits special and local laws regulating local and county business.

F. The Indiana Court of Appeals erroneously ruled that P.L. 44-1994 does not violate Article XI, Section 13 of the Indiana Constitution which prohibits special laws forming corporations.

5. The errors in the December 17, 1997 opinion of the Indiana Court of Appeals are more fully set forth in Appellants' Brief in Support of Petition for Transfer filed simultaneously with this petition.

6. This matter is a Public Lawsuit and should be advanced as expeditiously as is reasonably possible pursuant to Ind. Code § 34-417-7.

WHEREFORE, Appellants respectfully request the Indiana Supreme Court to grant transfer of this action, to vacate the December 17, 1997 opinion of the Indiana Court of Appeals, to reverse the April 25, 1997 judgment of the Tippecanoe Circuit Court, to declare that P.L.

44-1994 is unconstitutional, to remand this matter to the Tippecanoe Circuit Court, and for all other proper relief.

Respectfully submitted,

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Excerpts from December 24, 1997
Brief In Support of Petition for Transfer
of Appellants Charles A. Hoovler, et al.

* * *

II. THE COURT OF APPEALS ERRONEOUSLY RULED THAT P.L. 44-1994 DID NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

Hoovler contends that P.L. 44-1994 violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution because it employs population and time limitations which are not rationally related to its subject matter. It applies to counties having a population between 129,000 and 130,600, to cities having a population between 5,650 and 5,708, and to qualified sites existing as of July 1, 1994.

The Indiana Supreme Court previously determined in *Hoovler I* that the classification in P.L. 44-1994 "failed to bear a rational relationship to the subject matter in question and the reason for which does not inhere in the statute." 668 N.E.2d at 1234. If there were a rational relationship between the population limits and the subject matter of the act, the Supreme Court could not have determined that P.L. 44-1994 was a special and local law under *Dortch v. Lugar,* 255 Ind. 545, 266 N.E.2d 25 (1971). The Court of Appeals erroneously determined that the Supreme Court had not actually determined that there was no rational relationship between the population classifications in P.L. 44-1994 and the purposes of this act. December 17, 1997 opinion of Court of Appeals, page 7.

The Court of Appeals December 17, 1997 opinion is therefore contrary to the law of the case as established by *Hoovler I*. Also, if there were a rational relationship between the population limits and the subject matter of the act, the State could not have argued for severance of the population limits. *See Hoovler 1*, 668 N.E.2d at 1234, footnote 5.

Because the population classifications and time limitations embodied in P.L. 44-1994 are not rationally related to the subject matter of the act as a matter of law, the act violates the Equal Protection Clause of the Fourteenth Amendment as a matter of law. *Walters v. St. Louis*, 347 U.S. 231, 74 S. Ct. 505, 98 L. Ed. 660 (1954) (Equal Protection Clause requires that a classification have some relevance to the purpose for which the classification is made). *See also*, May 28, 1997 Brief of Appellants, pp. 16-17; June 26, 1997 Reply Brief of Appellants, pp. 8-11.

Furthermore, even if it were not the law of the case, it is apparent on the face of P.L. 44-1994 that the population and time limits are not rationally related to the subject matter of P.L. 44-1994. Even the State admitted in oral argument before the Indiana Court of Appeals that the population limits were merely a "facade" used to make the act appear constitutional. The State contends it is rational to treat Tippecanoe County differently from all other counties, but does not contend that there is any rational relationship between the population classifications and the subject matter of the act.

The erroneous but unavoidable implication of the December 17, 1997 opinion of the Indiana Court of Appeals, which has been designated "For Publication", is

that the Indiana General Assembly now has absolute freedom to use arbitrary and irrational population and time limits as devices of subterfuge to avoid the federal and state constitutional limitations on its power. This is a dangerous conclusion never espoused by the United States Supreme Court or Indiana Supreme Court and is contrary to the fundamental concept of limited constitutional government upon which our society is based.

* * *

Examples of Indiana Code Sections Using Population Classifications to Identify Specific Political Subdivisions

3-6-5-1
3-6-5.2-1
3-7-12-2
3-8-1-1
3-8-1-1.5
3-8-1-28.5
3-8-2-6
3-10-1-18
3-10-6-2.5
3-10-7-2.5
3-11-2-6
3-11-3-35
3-11-4-3
3-11-11-1.7
3-11-14-8
4-10-18-10
4-33-6-19
4-33-6-20
5-1-14-7
5-1.4-1-10
6-1.1-12.1-10
6-1.1-18.5-9.5
6-1.1-18.5-13
6-1.1-18.5-13.5
6-1.1-19-10
6-1.1-21.5-1
6-1.1-25-4.5
6-1.1-25-4.6
6-3.5-2-2
6-3.5-6-17.4
6-3.5-7-1
6-6-6.5-21.5
6-9-1-5
6-9-2-1
6-9-2.5-1
6-9-3-1
6-9-4-1
6-9-5-1
6-9-6-1
6-9-7-1
6-9-9-1
6-9-10-1
6-9-11-1
6-9-14-1
6-9-15-1
6-9-16-1
6-9-17-1
6-9-19-1
6-9-20-1
6-9-21-1
6-9-23-1
6-9-24-1
6-9-25-1
6-9-26-1
6-9-27-1
6-9-28-1
7.1-3-1-25
7.1-3-6-3.5
7.1-3-20-16
8-1-2-103
8-1-8.6-1
8-1.5-4-3
8-9.5-7-1
8-10-5-2
8-10-5-8.5
8-10-5-22
8-10-9-1
8-14-8-3
8-16-3.1-1
8-22-2-1
8-22-3-1.1
8-22-3-4.1
8-22-3.5-1
8-22-3.6-3
8-22-3.7-4.5
11-10-5-4
12-24-18-1
12-29-2-13
12-30-4-11
12-30-7-1
14-13-8-1
14-15-3-17
14-26-2-3
14-26-2-11
14-26-6-2
14-27-6-1
14-33-2-18
14-33-4-3
14-33-5-0.5
14-33-5.4-1
14-33-5.5-1
14-33-9-4
14-33-17-1
16-20-2-2
16-20-2-7
16-20-2-18
16-20-4-5
16-20-4-27
16-22-2-3.1

16-22-2-4
16-22-2-5
16-22-2-5.5
16-22-2-7
16-22-2-12
16-23-7-1
16-23-8-1
16-23-9-1
16-24-1-4
16-24-1-9
16-24-1-15
16-24-1-16
16-24-2-1
20-3-20-2
20-3-22-2
20-4-1-5
20-4-1-39
20-4-3-1
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20-4-10.1-5
20-4-10.1-7.5
20-4-16-6
20-5-17.5-2
20-5-17.5-3
20-5-17.5-4
20-5-40-1
20-8.1-3-6.1
20-14-2.5-6
20-14-7-6
21-2-13-3
21-5-12-3
21-6.1-4-1
22-11-3.1-2
25-37-1-15
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33-4-5.5-4
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36-7-4-1103
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36-7-5.1-5
36-7-5.1-9
36-7-5.1-11
36-7-7-4
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36-9-27-74
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36-9-35-1
36-10-3-38
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